



# *Military Law Review*

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**Robinson O. Everett**

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# SPECIFIED ISSUES IN THE UNITED STATES COURT OF MILITARY APPEALS: A RATIONALE

by Robinson O. Everett\*

## I. INTRODUCTION

Most of the cases that reach the United States Court of Military Appeals are brought to it by an accused's petition for review pursuant to article 67(b)(3) of the Uniform Code of Military Justice.<sup>1</sup> An appellate defense counsel, who has been appointed by The Judge Advocate General to represent the accused, files a supplement to the petition for review. This supplement seeks to persuade the court to exercise its discretionary jurisdiction to review the case. To this end, counsel will assign errors committed during the trial and review of the case. However, in a substantial number of cases the supplement filed in the Court of Military Appeals simply submits the case "on the merits" without assigning any error.

In the cases in which the Court of Military Appeals orders a grant of review, the Court of Military Appeals usually indicates in its order the assignments of error—usually referred to as "issues"—that it will consider. In subsequent pleadings and in oral argument appellate defense counsel are limited to discussing the issues that the court referred to in its order granting review. Occasionally, issues **as** to which the court grants review have not been mentioned by appellate defense counsel in their supplements to the petitions for review. The court often has referred to these as "specified" issues to distinguish them from issues that appellate defense counsel "assigned" in the supplement.

Recently, a leading commentator on the court has questioned the desirability of the court's practice of specifying issues for its review, even though they have not been raised by appellate defense counsel.<sup>2</sup> Likewise, a committee which has been appointed to make recommendations for improving the court's operations has indicated some concern about this practice.<sup>3</sup>

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<sup>1</sup>10 U.S.C. § 867(b)(3) (1982) [hereinafter UCMJ].

<sup>2</sup>See Fidell, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 Mil. L. Rev. 117 (1988).

<sup>3</sup>See Reestablishment of the Court Committee, 25 M.J. 154 (C.M.A. 1987).

In October 1988, during a question-and-answer session after I had spoken to a group of Air Force lawyers, I was asked whether the court should discontinue this practice if it was granted article III status. The unspoken premise for this question apparently was that, even though the specifying of issues not raised by appellate defense counsel might be appropriate for an article I court, it would not be suitable for an article III court.

In light of such concerns, I have tried to reexamine the court's practice of specifying issues with the thought that the practice may have outlived its usefulness. However, after such reexamination, I have concluded that, even though the court could save some time and probably reduce its Central Legal Staff by discontinuing the practice, it should nonetheless be retained.

## 11. SPECIFYING ISSUES AND IDENTIFYING "GOOD CAUSE"

The Uniform Code provides for automatic appeal to a court of military review, which "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."<sup>4</sup> This language seems to place on the judges of that court a duty to give service members relief from legal error whether or not their counsel have pointed out such error.

The Code further states that the Court of Military Appeals shall review the record in "all cases reviewed by a Court of Military Review in which, upon petition of the accused *and on good cause shown*, the Court of Military Appeals has granted a review."<sup>5</sup> This statutory language places on accuseds the burden of filing petitions with the court in order to invoke this jurisdiction. Moreover, it could be construed to require that the service members or their counsel show that good cause exists. However, as I interpret article 67(b)(3) the "good cause" also may be "shown" by the court's own staff—or even by a judge who concludes that the record of trial should be reviewed in greater depth.

Congress apparently does not disagree with this interpretation, which the court has followed for many years without any perceptible adverse comment from Capitol Hill. Indeed, I believe Congress intended that, if service members petitioned for review, the court should grant them relief from any prejudicial error that occurred at

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<sup>4</sup>UCMJ art. 66.

<sup>5</sup>UCMJ art 67(b)(3) (emphasis added).

the trial or review of their cases—even though appellate defense counsel may not have mentioned those errors in the supplements to the petitions.

Article 37 has made clear the legislative intent to shield military justice from any kind of command **influence**.<sup>6</sup> When military appellate defense counsel represent service members in the Court of Military Appeals, the possibility always exists—however remote—that counsel might be directed or influenced not to raise issues that would prove embarrassing to their service or to some commander. Although I believe the risk of such an occurrence is now very small, it cannot be ignored.

A few months ago, a colonel who had served as an appellate defense counsel mentioned to me that on one occasion he had received an unsigned order purporting to emanate from a superior and directing that he not proceed in a certain manner in his representation of an accused. To his credit, this lawyer then asked to receive a signed copy of the order; when none was forthcoming, he went ahead with the case as he originally had planned. Unfortunately, some counsel might display less fortitude under such circumstances; and if, in turn, the failure of counsel to raise an issue precluded review of that issue by the Court of Military Appeals, the accused's right to counsel would be violated.

Indeed, I understand that one reason for the creation of the court's Central Legal Staff many years ago was a reported remark by a Judge Advocate General that he would decide what issues the Court of Military Appeals would review, because he would instruct appellate counsel what issues to present. The comment was reported to the then Chief Judge; and he concluded that it was necessary for the court to have a staff that could undertake independent review of the record and bring possible legal errors to the court's attention, even if the military appellate defense counsel were directed or chose not to raise them.

Equally important is the perception of justice on the part of service members, their families, and the public. As anyone who is acquainted with the appellate process knows, accuseds will sometimes want their counsel to raise issues on appeal that in the lawyers' professional judgment have no merit. According to the Supreme Court, a defendant's right to counsel does not imply that lawyers must raise on appeal all frivolous issues that their clients wish them to **advance**.<sup>7</sup>

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<sup>6</sup>*Cf.* *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986); *Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988).

<sup>7</sup>*Jones v. Barnes*, 463 U.S. 745 (1983).



The Court of Military Appeals has decided, however, that Congress intended that appellate defense counsel in the military justice system bring to the attention of reviewing authorities any issues that the accused requests counsel to raise.<sup>8</sup> In this way, an accused is precluded from claiming prejudice because the appellate defense counsel was too lazy or too timid to present a meritorious issue, as the client had requested. Similarly, the court's practice of specifying issues forestalls a subsequent claim that an accused did not receive an adequate review of errors in the record because the appellate counsel neglected to call them to the attention of the Court of Military Appeals.

Admittedly, the military appellate defense counsel who appear in the Court of Military Appeals usually are highly skilled. However, it must be recognized that experience levels vary from service to service and from time to time. Also, sometimes an appellate defense counsel has an overload of cases and has little time to examine each record of trial in detail.

Furthermore, in the military justice system—unlike the civilian courts—the lawyers who handle appeals usually are not the ones who represented the accuseds at their trials. Even during the appellate process the counsel who were representing the accuseds may leave the service or be reassigned, in which event the lawyers who prepare the supplements to the petitions for review may not be the same lawyers who previously represented the accuseds at the court of military review. Due to the lack of continuity, a risk exists that the appellate defense counsel who submit the supplements in the Court of Military Appeals may, because of lack of familiarity with the earlier proceedings, overlook significant issues of law that should be raised.

Most of my comments have pertained chiefly to military counsel. However, since coming on the court in 1980, I have noticed that an increasing number of civilian lawyers are appearing before us. Many of these attorneys are experienced advocates, but some may be unfamiliar with court-martial practice and, for this reason, may not recognize important appellate issues. Even though accuseds have retained civilian counsel at their own expense, when they could have been represented without charge by military counsel, this is no reason to reduce the protection granted to them.<sup>9</sup> Thus, if the court specifies issues not assigned by military appellate defense counsel, there is no reason to follow a different practice when the accuseds are represented by civilian attorneys.

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<sup>8</sup>United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

<sup>9</sup>Cf. Cuyler v. Sullivan, 446 U.S. 335 (1980).

## **111. ADVANTAGES OF SPECIFYING ISSUES**

From several other standpoints I perceive advantages in the court's practice of specifying issues. The judges and staff of the Court of Military Appeals review cases from all the armed services, and they may become aware of issues that are being routinely raised in one service but not in another. In those instances, it may be desirable for the court to specify the issues in the cases where they have not been raised by counsel, because in this way the court better assures that members of different armed services receive more uniform treatment in courts-martial.

Sometimes the court hands down an opinion in one case that would suggest an issue to be raised in other cases. If appellate defense counsel have already filed the supplements to the petitions in the other cases and if the court does not specify the issues, it will be necessary for counsel to submit motions asking for leave to submit pleadings that will raise the new issue. If these motions are granted, counsel will be allowed to amend the pleadings they have previously filed.

This procedure is more cumbersome and time consuming than for the court itself to specify the new issues at the outset on its own initiative. Moreover, when the court specifies the issues, accuseds are not prejudiced if their lawyers failed to recognize that the court's opinion in another case presents issues in their own cases.

The judges or the staff may be aware of issues that the court is dealing with in cases currently under consideration or of issues that seem likely to come before the court in the near future. If those issues exist in pending cases but counsel have not raised them, the court's specifying of those issues *sua sponte* may enable the court to decide them at an earlier time than if the court waited for cases in which counsel raised the issues. In turn, disposing of these issues rapidly may provide needed guidance for persons trying cases in the field and thus reduce the likelihood of errors in future trials.

## **IV. RESPONSE TO CRITICISM**

The criticism has been made that to specify issues that an accused has not raised is a regression to a bygone era of paternalism in military justice. Although paternalism is on the wane and waiver is being invoked more frequently than before, military justice still imposes requirements unmatched in the civilian courts.

The best example of a uniquely military requirement may be article 45, which concerns pleas of the accused and sometimes may prevent military judges from accepting guilty pleas, even though, after

consulting with counsel, accuseds are perfectly willing to do so.<sup>10</sup> If service members testify during the providence inquiry in a manner inconsistent with their guilty pleas, military judges are not permitted to accept the pleas, no matter how much the accuseds want them to do so. In this instance, Congress has directed that the findings of the court-martial be accurate, even though the accuseds might be willing to accept inaccurate findings. This protection was probably considered to be especially important for young service members, who may be prone to give up important rights without appreciating the future adverse consequences of court-martial convictions and sentences. Likewise, I believe that Congress intended for the Court of Military Appeals to adopt procedures—such as the specifying of issues—that would protect service members against unjust convictions and unfair sentences.

There is nothing novel about the concept that an appellate court should correct legal errors, even if counsel have not raised them; nor is this concept limited to article I courts. For example, both Federal Rule of Evidence 103(d) and its twin, Military Rule of Evidence 103(d), authorize an appellate court to give relief for “plain error” with respect to evidence that the trial court has admitted without objection from counsel at trial. Specifying issues permits the court to deal with various kinds of “plain error,” even though appellate defense counsel have failed to assign the error.

The suggestion has been made that for the Court of Military Appeals to specify issues constitutes an implied criticism of the skill of appellate defense counsel. The premise for this suggestion is that, if the lawyers were doing their jobs properly, there would be no occasion for the court to specify issues. This premise is faulty. There can be many reasons for specifying issues other than may be attributed to any fault of counsel. The judges are in a better position to know what issues seem important to them than counsel can possibly be. The judges have access to information about pending cases that counsel do not possess. Certainly a practice designed to protect accused service members from unjust convictions should not be terminated because of undue sensitivity on counsel’s part.

Furthermore, I reject the contention that appellate defense counsel will become slothful in assigning errors if they believe the court will cure their omissions. I cannot imagine that lawyers could be so un-

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<sup>10</sup>It is constitutionally permissible for a judge to accept a guilty plea and to base findings thereon, even though the accused has not conceded—and, indeed, has denied—his criminal liability for the offense. *See* *North Carolina v. Alford*, 400 U.S. 25 (1970).

professional as to write slipshod legal pleadings on the assumption that a court would cure any omissions and protect their clients' interests.

Obviously, there will be differences of viewpoint as to which issues the court should specify when counsel have not raised them. For example, the court has often specified issues involving the multiplicity of offenses. Frequently the relief that the court ultimately grants in these cases affects only the findings but produces no reduction in sentence. Some would contend that the court has wasted its time and that, absent a change in sentence, there is no reason to be concerned about the findings. Although I recognize that this position has some merit, I conclude that even in this situation it often is appropriate to specify issues.

Certainly, the congressional concern for accuracy of results, which is reflected in the limitations on guilty pleas imposed by article 45, suggests that service members' records of convictions should be corrected if, by reason of overcharging or multiplicity, they have been made to appear guilty of more crimes than they actually committed. The Supreme Court seems to have accepted a similar view in holding that a defendant convicted of two crimes that were the same under the *Blockburger* test<sup>11</sup> was entitled to have one of the convictions vacated, even though he had received concurrent sentences.<sup>12</sup>

## V. CONCLUSION

Although there may be reasonable differences as to the extent to which the Court of Military Appeals should specify issues when counsel have not raised them, I am still convinced that the practice of specifying issues is desirable and consistent with congressional intent. In my view it has not been demonstrated why this practice should be discontinued.

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<sup>11</sup>*Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>12</sup>*Ball v. United States*, 47C U.S. 856 (1985).

# USCMA AND THE SPECIFIED ISSUE: THE CURRENT PRACTICE

by William N. Early, Lizann M. Longstreet,  
and James S. Richardson\*

## I. INTRODUCTION

In this, its 37th year of operation, the United States Court of Military Appeals (COMA) finds itself under intense and welcomed scrutiny from various sources. A Department of Defense Study Group has issued its report;<sup>1</sup> the Court Committee<sup>2</sup> has held meetings and heard testimony for some 12 months and promises a report by January 1989; the Court Rules Advisory Committee<sup>3</sup> has proposed new case processing standards designed to reduce delays in case disposition; and a noted member of the court's bar<sup>4</sup> has delivered an incisive evaluation of some of its practices in a lecture at The Judge Advocate General's School in Charlottesville, Virginia. All of this examination

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The writers wish to acknowledge the contributions of Mrs. Barbara Passamaneck, Chief Legal Technician of the Central Legal Staff, and Miss Agnes Kiang, Assistant Court Librarian, for the collection and tabulation of statistics that appear in this article. Mr. John A. Cutts III, Deputy Clerk of the court and Reporter of Decisions, also provided invaluable assistance in reviewing the article for form and content and in checking research and citations.

<sup>1</sup>The Department of Defense Ad Hoc Study Group was appointed on July 17, 1987, and included members of the uniformed services (including the Coast Guard) and members of the General Counsel's office.

<sup>2</sup>The Court Committee, consisting of ten distinguished members of the civilian bar (including a reporter) and support staff, was appointed by the court in October 1987 "to study issues and make recommendations concerning the court's statutory role and mandate, status, organization, size, staff, administration, and operations." Rather than a new creation, this was a reestablishment of the Committee which was originally created in 1953 and chaired by Whitney North Seymour. 25 M.J. XCIX (C.M.A. 1987).

<sup>3</sup>The Rules Advisory Committee, a continuing body, was appointed by the court to study and make recommendations concerning the court's Rules of Practice and Procedure.

<sup>4</sup>Fidell and Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 Mil. L. Rev. 117 (1988).

seems to be, at least partially, generated by the renewed emphasis on converting the court from article I to article III status.

As an institution of this age, the court welcomes constructive criticism from its friends, because a new look at entrenched practices offers the court a chance to improve and to continue to grow. The court has carefully considered each study and has conducted certain studies of its own designed to improve its management practices. The court has already approved for a year of trial a new procedure giving the government the option of not filing an opposing brief to the petition brief of the accused,<sup>5</sup> and the court has reinstated a "term system" after some thirteen years of non-use.<sup>6</sup> Through an intense effort, the court has reduced its carryover backlog of cases both in the petition and master dockets. After enjoying the stability of three sitting judges for the first time in several years, the court is ready to look at and to consider ideas to improve its case processing times and to be ready to respond to new developments in the law and practice of the military community.

An important criticism has been directed at the court's longstanding practice of specifying issues and its use of the Central Legal Staff in reviewing cases where appellate defense counsel have assigned no issues. This article will address these matters.

## **11. "REVIEW" AND "EXAMINATION": CASES AND ISSUES**

A currently popular syllogism among those examining the court's procedures goes about like this:

1. Article 67(b)(3) of the Uniform Code of Military Justice states that the court shall review "all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review."<sup>7</sup>

2. A petition submitted on the merits is, in the opinion of appellate defense counsel, free of appellate issues, so it does not show "good cause" for review.

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<sup>5</sup>This rule, which was established by order of the court dated October 12, 1988, permits appellate government counsel to file, in lieu of an answer, a letter indicating general opposition to errors assigned by appellate defense counsel or indicating no opposition to said errors.

<sup>6</sup>The term system was adopted by order of the court dated September 30, 1988, and was accompanied by an announcement of the cases carried over from the previous year.

<sup>7</sup>Uniform Code of Military Justice art. 67(b)(3), 10 U.S.C. § 867(b)(3) (1982) [hereinafter UCMJ].

3. Yet the court routinely reviews merits cases and occasionally specifies an issue for review.

4. The court thereby violates its statutory grant of authority in these cases.

The fallacy in this syllogism is that the court *neuer* reviews a case unless it concludes that good cause is shown. Article 67(b)(3) refers to the action of the court after grant of an issue, irrespective of who advanced that issue, counsel, judge, or staff. When counsel submits a case “on the merits,” the staff examines it to determine whether there exists “good cause” for review by the court. The staff creates a petition memorandum, which it then submits to the judges for consideration. This memorandum commonly recommends “denial,” but even then the case is further reviewed by chambers and the individual judges to ensure that there is no “good cause” for granting review. Occasionally the staff will discover an unraised issue for which the staff recommends further review; if the judges agree, the court then “specifies” the issue for grant of review. Or the judges in their examination may discover an issue deserving further consideration, and they may direct the staff to draft a specified issue. Thus, there are two stages to the appellate process: examination of the record for possible error; and then review after development and granting of an issue meriting judicial consideration.

A narrow reading of article 67(b)(3) would seem to prohibit the court from considering the record in a case submitted on the merits simply because appellate counsel uncovered no issue.

This flies in the face of the direction of the Supreme Court in *Anders v. California*<sup>8</sup> and the practice of the Court of Military Appeals from its inception. Whereas article 67(b)(3) concerns the process of selecting cases (and issues) for judicial review, article 59(a) provides the standard for remedial action favorable to the accused. The former provides for review on petition and on good cause shown, and the latter provides for reversal only when an “error materially prejudices the substantial rights of the accused.”<sup>9</sup> The standard for review of a case by the court is far less than that required for reversal. This explains why many cases granted review on specified issues result in affirmance. It also explains why the judges feel free to specify an issue to get briefing from counsel without regard to any preconcep-

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<sup>8</sup>386 U.S. 738 (1967). For a full discussion of the responsibilities of appellate counsel under *Anders*, see *Nell v. James*, 811 F.2d 100 (2d Cir. 1987). Other examples include *United States v. Castello*, 830 F.2d 99 (7th Cir. 1987) and *United States v. Edwards*, 822 F.2d 1012 (11th Cir. 1987).

<sup>9</sup>UCMJ art. 59(a).

tions as to ultimate disposition. In sum, grant of a specified issue no more preordains reversal than does grant of an issue raised by appellate counsel.

There are several reasons why the court has never adopted a narrow construction of article 67(b)(3). First, the court has always been cognizant that a primary reason for its creation was to provide a final civilian review of military cases. This is in keeping with the congressional hearings on the Code and the general philosophy of our Constitution that the military establishment should always be under civilian control and supervision. This philosophical bent towards "paternalism," sometimes criticized, was largely fostered by perceived, and sometimes actual, excesses in the way discipline was administered under the Articles of War and under The Articles of the Government of the Navy during the First and Second World Wars.

A number of examples of "paternalism" exist elsewhere in the Code. Article 45(a)<sup>10</sup> prevents service members from pleading guilty unless they can demonstrate that they believe they actually are guilty, which is contrary to the civilian practice. Article 66<sup>11</sup> provides for automatic appeal to a military appellate court for a convicted accused sentenced to a punitive discharge or confinement for a year or more, unless the accused specifically waives this right. The aforementioned article 67(b)(3) allows an accused to invoke the appellate jurisdiction of this court in a very simple way. Article 70<sup>12</sup> provides an accused free appellate representation all the way to the United States Supreme Court. Recognizing that the Code is in reality a statutory restriction on the ability of the commander to enforce discipline, it seems logical that Congress would wish to have a final civilian review of that exercise by a civilian tribunal.

Independent examination of a case by staff attorneys and judges removes a perception of military control of the appellate process. However objectively false it may be, there is still the perception that representation by uniformed counsel, without regard to their particular talents, would not be as spirited as representation by civilian counsel, who would be entirely free of any aspects of command control. Clearly this is why the Code provides for civilian counsel if selected and paid for by the accused.<sup>13</sup> Such a perception of the defense counsel as a "company man" or, in the terms of the 1960's, "a

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<sup>10</sup>UCMJ art. 45(a).

<sup>11</sup>UCMJ art. 66.

<sup>12</sup>UCMJ art. 70.

<sup>13</sup>See UCMJ art. 70(d).



lifer,” is difficult to erase in the minds of a convicted accused, as evidenced by the repetitive assertions of inadequate representation that, upon investigation, most often prove baseless. Those holding such perceptions see the military justice system as unfair to or “loaded” against the lower grade enlisted service member. This perception would be even greater if there was not a civilian court ready to give independent review of a record with a view to uncovering any overbearing of the existent military command system.<sup>14</sup> Thus, the court’s independent power to reach into a record and specify an issue serves to give more verisimilitude and credibility to the military justice system.

A small anecdote serves to emphasize the need for an unrestricted, unhampered Court of Military Appeals. During the organizational meetings, when the Chief Judge, Clerk, and Chief Commissioner discussed the creation of support staff for the court, it came to the attention of the Chief Judge that a senior legal officer of one of the military services had stated that he would control the issues brought before the court for review. The Chief Judge took this as a challenge to the independence of the court and approved the creation of a staff of commissioners whose function was to examine all records petitioned to the court to seek out issues whether asserted or not.<sup>15</sup> This, of course, was the creation of what is now called the “Central Legal Staff” and was the first such use of staff attorneys in this manner by any court.

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<sup>14</sup>Apparently this perception continued for some time. An article on the court published in 1965 states:

Helping the judges are 12 lawyers (the 10 senior ones are called commissioners) and an administrative staff of 25, with an annual budget of \$530,000.

The court knows that in a typical case—800 or more of them a year—the man’s lawyer is no Edward Bennett Williams or Clarence Darrow. It, therefore, scans the records for possible errors other than those the defense lawyer claims.

That is where the staff of 10 commissioners (senior lawyers with sharp eyes for flaws in a record) first get into the act. One commissioner, with at least one other checking him, reads the whole record, from the dawn of suspicion in the heart of the MP to the tagline of the opinion of the board of review.

The commissioner makes a summary, pointing out anything he thinks the judges ought to know, and makes recommendations. The summary, plus the record, goes to each of the three judges.

At the end of this road the court will, almost nine times out of ten, “deny” the petition for review. But the man has had his review. His appeal has been fully considered. The denial means simply that the defense lawyer didn’t have a substantial claim of “error.” Nor did the commissioners or the judges find any that he missed.

Reed, *Court of Military Appeals*, Army Times Family Magazine, July 21, 1965.

<sup>15</sup>This anecdote comes from Mr. Alfred C. Proulx, first Clerk of the court.

One might explain such an attitude as being part of the inherent distrust of things civilian by military commanders of the time who viewed the court as an unwarranted and unneeded hampering of their authority. However, we cannot presume that illegal command influence is moribund even in this "enlightened age."<sup>16</sup>

The unstated fifth statement in the syllogism is: Does not this indicate a mistrust of military counsel? Not at all; the fact is that specification of issues provides a direct channel for the court to communicate with appellate counsel without waiting for oral argument.<sup>17</sup> It indicates those areas of law or fact in a particular case on which the judges wish the assistance of counsel. All appellate counsel are familiar with that debilitating first question from the bench in oral argument that identifies a concern for argument in an area in which they are not prepared. Considering that the judges come in "hot" and usually fortified by a detailed bench memorandum that chambers staff has prepared, it will occasionally happen that a judge will approach a case with a view totally different from the way counsel have developed the issues. Specification transmits this concern at a point in the appellate process when counsel have time to prepare to address the concerns of the judges as well as to assert their own view of the case."

## 111. FACTS AND FIGURES

Recognizing at the outset that we have "insider" knowledge as to why issues were specified by the court, we offer the following analysis of issues specified by the court during fiscal years 1986 through 1988. We selected these years because they most closely approximate the tenure of Mr. Early as Staff Director and thus provide the best insight into the reasons for specification. We do not attempt to be conclusive, because a comprehensive review of the history of specified issues by the court over the years is beyond the scope of this article,<sup>19</sup> but we have sought to achieve the fairest selection."

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<sup>16</sup>See *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986).

<sup>17</sup>See, e.g., *United States v. Simmons*, 812 F.2d 561, 562, n.1 (9th Cir. 1987); *Franklin v. State*, 526 So. 2d 159, 160 (Fla. Dist. Ct. App. 1988); *Norman v. State*, 277 S.E.2d 707 (S.C. 1981). See also R. Martineau, *Modern Appellate Practice* § 3.9, at 40 (1983).

"*Cotton Petroleum Corp. v. New Mexico*, 108 S. Ct. 1466 (1988); *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 500 (1987). For U.S. Supreme Court practices see R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 5.11 (6th ed. 1986). For other courts' practices, see part IV E of this article.

<sup>19</sup>See Walker and Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 Vand. L. Rev. 228, 232 (1953) (discussion of the early operation of the court).

<sup>20</sup>We address the policies and practices of the court *infra*. For an historical study, see Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, 31 JAG J. 99 (1980).

Since commencement of fiscal year 1986 the court has granted a total of 119 petitions for review on “specified issues.” While this may appear to be a large raw number, it should be remembered that the court considered 7,727 initial filings under its discretionary jurisdiction in this three-year period. During the same period the court granted review of 607 cases. Thus the court has elected to specify issues in only about 19.6% of the cases granted review and in less than 2% of those cases filed. The records of the court indicate that staff attorneys suggested 76 of the specified issue cases or about 64% of the issues. The remaining issues were the product of the judges’ examination of the record.

The data also show a declining trend in the specification of issues. About 20% of the cases granted review during FY 1986 and FY 1987 were on issues that the court specified. However, during FY 1988 only 9 cases of the 117 granted review, or about 8%, contained specified issues.

Even this figure tends to be somewhat misleading. A number of factors may prompt suggestion of a “specified” issue unrelated to the question of the issue’s ultimate merit. The most obvious category is the circumstance where the court has granted a petition for review in another case (either as the result of an error that counsel has raised or as a specified issue) and the grant of review is not generally known to the appellate bar or, for some reason, counsel have overlooked it. In such circumstances, fundamental fairness dictates that all other appellants similarly situated receive the same treatment. An examination of those same cases indicates that 65 of the cases granted review on issues specified “by the court” fall into this category.

Additionally, a number of cases in which the court grants petitions on specified issues are in actuality cases in which counsel have raised similar issues, but the staff has modified them to more closely reflect the facts of the case or some aspect of the issue that the court deems to be of greater import. This particular time frame is rich in such issues, because three major cases involving alleged unlawful command influence were pending appellate review at the time.” The clearest examples that overlap both of these areas are the cases growing from the problems within the 3d Armored Division. The court “specified” an issue whether an appellant was required to demonstrate specific harm to warrant reversal when unlawful command influence,

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<sup>21</sup>See *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987) (the *Peyote Platoon* cases and those related thereto); *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986) (the *U.S.S. Independence* cases); and *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986) (the 3d Armored Division cases).

although present during the trial, was not detected until the case was in the appellate process. Counsel in those cases tended to view the matter as relating to the trial process. However, as the court perceived it, the real issues were whether unlawful command influence was subject to a plain-error analysis, requiring reversal with a finding of prejudice, or whether the requirements of article 59(a) would apply.”

Another example is *United States v. Payton*,<sup>23</sup> where counsel had framed the issue in terms of general military due process. However, the court determined that such a broad, almost constitutional, issue was not appropriate for resolution of the case and its progeny. Therefore, it refined the issue so as to decide only the questions actually posed by the facts, including the issue of whether such a matter might be waived by the appellant’s pleas of guilty.<sup>24</sup> At least 28 of the cases granted review on “specified issues” during this period of time are of this category.

Of particular note are three cases, *United States v. Simpkins*,<sup>25</sup> *United States v. Turner*,<sup>26</sup> and *United States v. Bankston*.<sup>27</sup> In those cases the judges and staff noted simultaneously, although in different cases, that the United States Navy-Marine Corps Court of Military Review had apparently failed to comply with the statutory mandate of article 66 of the Code by not specifically finding the proceedings correct in law *and* fact. Review of the *facts* and the law by a court of military review is an absolute right of a military appellant; failure of the lower court to do so is per se reversible error. This is an issue that warrants review no matter how discovered. Whether the appellant derives some benefit from the second consideration of the facts of record by the court of military review is not material to this inquiry.

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<sup>22</sup>See *United States v. Thomas*, 22 M.J. 388 (C.M.A.1986). The issue actually decided by the court was first specified in *United States v. Jackson*, 20 M.J. 16 (C.M.A. 1985), a petition granted review during FY 1985. Counsel in these cases tended to frame the issue in terms of “jurisdiction,” i.e., whether the convening authority had disqualified himself by his actions, thus invalidating the entire process from referral to approval of the findings and sentence. This is one of the most clear examples of paternalism in the system, and is one of the remaining vestiges of the court’s original invocation of the idea of general prejudice.

<sup>23</sup>23 M.J. 379 (C.M.A. 1987).

<sup>24</sup>No criticism of counsel is intended by this comment. Indeed the quality and zealotness of the representation in this court has historically been remarkable. Included among military and civilian members of its bar are such luminaries as F. Lee Bailey, Joseph Califano (as an active duty officer of the Navy), and numerous other officers who went on to distinguished careers in military and civilian life.

<sup>25</sup>24 M.J. 49 (C.M.A. 1987).

<sup>26</sup>25 M.J. 324 (C.M.A. 1987).

<sup>27</sup>26 M.J. 82 (C.M.A.1988).

Appellants were deprived of a statutory right (not available in most civilian justice systems) and were entitled to COMA's enforcement of that right. This type of case would clearly fall within the supervisory jurisdiction of the court. Thus, the court granted review of an issue addressing the matter in all three cases.

Similarly, as the staff and judges receive and examine the advance sheets of other courts, the facts of a particular case may suggest an issue that counsel have not raised at the Court of Military Appeals but that is currently being litigated in the United States Courts of Appeals. This has been particularly true following the adoption of the Military Rules of Evidence, which largely are carbon copies of the Federal Rules. As a matter of judicial economy, it is to the advantage of the court to specify such issues where the facts and the litigational posture of the case make it appropriate.

It is perhaps of interest that the only case in which the court specified an issue based on the decisional law of another court was proposed by the judges themselves. Although this does not indicate that the staff does not consider "outside" law, for want of a better term, it does tend to indicate that the court tends to regard *stare decisis* as more important than "civilianizing" military justice, looking for issues not raised by counsel, or in granting review of cases simply because of their interesting nature.

Another, although not so clearly defined, category of "specified issues is that developed by the staff's examination of the record and the petition for review where the appellant has personally asserted some issue as error for consideration for the appellate court system."<sup>28</sup> A military appellant has an absolute right to have such matters considered on appeal, regardless of counsel's professional judgment of the issue. Such matters may well meet the threshold of article 67 and warrant plenary review (or at least briefs by counsel), even where the court ultimately determines that substantial prejudice does not exist. Again, in the two cases in which the court elected to specify issues based on such submissions, the issues were suggested by the judges of the court and not by staff counsel.

Turning to a legal analysis of the issues that the court has specified, it is somewhat more difficult to devise a statistical matrix on such issues. There are a number of dynamics at work, and these require an understanding of the mission of the court as well as the interplay between the staff and the judges. We have elsewhere adverted

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<sup>28</sup>See *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Compare *Jones v. Barnes*, 463 U.S. 745 (1983), with *United States v. Arroyo*, 17 M.J. 224 (C.M.A. 1984).

to the differences between article 67(b) and article 59(a).<sup>29</sup> Because the former does not require a showing of harm, the fact of a grant of review does not automatically indicate that the court believes prejudicial error has occurred. However, it should be noted that 25 of the cases granted review during this time period involved issues that would be denominated "plain error," a category which is generally considered to be a valid basis for a grant of review in the absence of error assigned by counsel.<sup>30</sup>

Of greater importance to the court, however, is consideration of those cases where there is some indication of unlawful command influence or other government overbearing. If the court has any defined mission from Congress, it is to staunch this wound on military justice and to act as a bastion against such overreaching. Thirty-one of the cases granted review as "specified" were directly or tangentially the product of allegations of unlawful command control of the court-martial process. A classic example of the latter is *United States v. Zelenski*.<sup>31</sup> This case raised the question whether the government was requiring accuseds to forego their right to trials by members in exchange for sentence limitations. While this is not unlawful command control in its classic sense (i.e., manipulation of the trial by superiors), the court was troubled by what appeared to be a situation of unequal bargaining power, forcing an accused to forego a statutory right in exchange for sentence limitations. This is within the court's historic mandate and derives from its charter as the civilian review authority over the court-martial process.

The issue of unlawful command control spawned a significant number of "trailer" cases. As noted above, 33 of the specified issues related to some form of command overbearing. This amounts to slightly over half of the cases granted as trailer cases. Even more importantly, twelve of the "specified" issues were actually modifications of issues that counsel raised. Thus, it is clear that even where the court's basic role is at stake and where it may be expected to exercise some paternalism, it has done so only with discretion.

Next, one should consider the matter of disposition. A surface analysis of the nature of specified issues would suggest that once an issue is specified an appellant might expect some form of relief.

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<sup>29</sup>A comparison of the wording of article 67(b)(3) and article 59(a) is instructive. Clearly, if Congress had intended that the latter subsume the former, two separate statutes would not be necessary.

<sup>30</sup>A large number of specified issues, 7 in the sample taken by Mr. Fidell and 14 in the three-year study encompassed by this article, are the product of the fact that the court saw that unreasonable multiplication of charges was plain error. *See United States v. Holt*, 16 M.J. 393, 394 (C.M.A. 1983).

<sup>31</sup>24 M.J. 1 (C.M.A. 1987).

However, this result-oriented approach misses the point of the two-stage process by which the Court of Military Appeals decides a case. The determination that “good cause” exists to consider a case on plenary review is not a declaration that substantial prejudice exists. Nonetheless, the court afforded the appellant some form of relief in 42 of 119 cases in which it specified issues.

A better indicia of the importance attached to these cases is the procedural context in which they were treated. Notwithstanding the fact that 55% of the cases reviewed were granted to trail other pending cases, a total of 33 or 26% were of sufficient importance to warrant oral argument. Five other cases were the subject of opinions produced without the benefit of oral argument. Consequently, it may be seen that even when specifying issues the court conserves its resources for those cases which are of more than passing moment.

## IV. WHY SPECIFY?

### A. BASIC PREMISES

The proper role of an appellate court was defined by Judge John J. Parker as follows: “The function of the reviewing court is: (1) to see that justice is done according to law in the cases that are brought before it, (2) to see that justice is administered uniformly throughout the state, and (3) to give authoritative expression to the developing body of the law.”<sup>32</sup> This expression was somewhat innovative, because the nineteenth-century view of the function of the appellate *law*<sup>33</sup> court was to determine if prejudicial error was committed at the trial level, and, if so, to correct it.<sup>34</sup> Indeed, there was a view at one time that the reviewing court could resolve the case only on the precedent cited below.<sup>35</sup> The United States Supreme Court rejected this view in the case of *The Schooner Peggy*.<sup>36</sup> Since then courts have felt free to decide a case on a given issue on any grounds available.<sup>37</sup> In addition, appellate courts have generally believed that they must consider sua sponte plain error or defects affecting substantial rights,

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<sup>32</sup>Parker, *Improving Appellate Methods*, 25 N.Y.U.L. Rev. 1, 1 (1950), quoted in Leflar, *Internal Operating Procedures of Appellate Courts* 1-2 (1976). Professor Leflar observes that this definition “calls for more than the mere correction of error.” Leflar, *supra*, at 2.

<sup>33</sup>Emphasis is added to distinguish scope of review under a court’s equity power.

<sup>34</sup>Leflar, *supra* note 32, at 3.

<sup>35</sup>See Vestal, *Sua Sponte Consideration in Appellate Review*, XXVII Fordham L. Rev. 477 (1958-59).

<sup>36</sup>*United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). It is interesting to note that the question before the Court was whether it could consider intervening changes in the law even though not argued to it.

<sup>37</sup>Vestal, *supra* note 35, at 480.

even if not raised by counsel before them or below.<sup>38</sup> Thus the seminal question is: how is the court to react when it discovers unassigned substantial errors in the decision before it for review?

Some noted authorities have suggested that the court should *sua sponte* consider the errors and decide accordingly. The benefit of this practice is that it speeds appellate review because it avoids the problems of rebriefing or reargument.<sup>39</sup> The contrary view is that it deprives the appellate court of the views of counsel who are, admittedly, best able to present the positions of their clients.<sup>40</sup> This, of course, is

<sup>38</sup>See Re, Brief Writing and Oral Argument 45-49 (5th ed. 1983).

<sup>39</sup>Tate, *Sua Sponte Consideration on Appeal*, 9 Trial Judges Journal 68 (1970).

<sup>40</sup>*Sua sponte* treatment of issues may well be doomed by the recent Supreme Court case of *Penson v. Ohio*, 109 S. Ct. 346 (1988). There the indigent defendant's appointed appellate counsel filed a certification of meritless appeal and moved for permission to withdraw. The Ohio Court of Appeals granted the motion but added that the court would independently review the record to determine whether there was any error requiring reversal or modification of the sentence. After reviewing the record and briefs filed by defendant's co-defendants, the court concluded that there were several "arguable claims" and further found error in an instruction concerning one count. It reversed the conviction and sentence on that count but affirmed on the other counts. Petitioner eventually reached the Supreme Court of the United States, and the Court reversed. In so doing the Court held:

It is apparent that the Ohio Court of Appeals did not follow the *Anders* procedures when it granted appellate counsel's motion to withdraw and that it committed an even more serious error when it failed to appoint new counsel after finding that the record supported several arguably meritorious grounds for reversal of petitioner's conviction and modification of his sentence. As a result, petitioner was left without constitutionally adequate representation on appeal.

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Moreover, the Court of Appeals should not have acted on the motion to withdraw before it made its own examination of the record to determine whether counsel's evaluation of the case was sound. . . .

. . . . The Court of Appeals' determination that arguable issues were presented by the record, therefore, created a constitutional imperative that counsel be appointed.

109 S. Ct. at 350-51. In a footnote the Court observed:

One hurdle faced by an appellate court in reviewing a record on appeal without the assistance of counsel is that the record may not accurately and unambiguously reflect all that occurred at trial. Presumably, appellate counsel may contact the trial attorney to discuss the case and may thus, in arguing the appeal, shed additional light on the proceedings below. The court, of course, is not in the position to conduct such *ex parte* communications.

*Id.* at 351 n.5.

This case, involving an indigent petitioner, is basically grounded on *Anders v. California*, 386 U.S. 738 (1967), and hence may be limited to the situation of court-appointed counsel. However, there is an early reference to *Douglas v. California*, 372 U.S. 353 (1963), where it was held that the fourteenth amendment "guarantees a criminal appellant the right to counsel on a first appeal as of right." *Penson*, 109 S. Ct. at 349 (citing *Douglas*). *Douglas* is also cited for the proposition that review of the record



particularly true in criminal actions. The Court of Military Appeals has adopted the practice of securing the views of counsel.

Two procedural practices made adoption of the practice easier for the Court of Military Appeals than for many others: 1) the two-step briefing practice (brief in support of petition for grant of review, and brief in support of issues granted); and 2) the availability of a large central staff to prescreen the entire record of trial prior to the judges' decision to grant or deny the petition (this assumes the prerogative nature of the court's reviewing authority).

Having these advantages available to it from its inception, can it be doubted that asking for additional briefing (and argument) on the issues that the court discovers is preferable to deciding the issues *sua sponte*? We would answer "no." And we would bolster our answer with the proposition that the court, rather than the counsel, should control the disposition of the case before it. This proposition appears particularly apposite in view of the concept of the court as "the Supreme Court of the Military," a concept which presupposes a "supervisory" function over the administration of the entire military justice scheme.<sup>41</sup>

In sum, then, our logic is that the Court of Military Appeals is statutorily obligated to consider errors which may "materially [prejudice] the substantial rights of the accused"<sup>42</sup> however discovered, and that the court should request the assistance of counsel in disposing of those errors. In addition the court should, as much as possible, attempt to ensure "that justice is administered uniformly throughout the [military community]" and "to give authoritative expression to the developing body of the law."<sup>43</sup> Hence the practice of "specifying."

## ***B. THREE REASONS FOR SPECIFYING ISSUES***

Our analysis of the considered cases indicates that there are three reasons for specifying issues.

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by the appellate court to determine whether counsel should be appointed "is an inadequate substitute for guaranteed representation." *Id.* (citing *Douglas*). Thus, it is at least questionable whether *sua sponte* consideration by a court which develops an unassigned issue even after submission of briefs will suffice.

The language of this opinion may well justify the practice of specifying issues by itself, and certainly affirms the principle set forth by the Court of Military Appeals in *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>41</sup>The language appears in many places in *Index and Legislative History, Uniform Code of Military Justice 1949-1950* (1950).

<sup>42</sup>UCMJ art. 59(a).

<sup>43</sup>*Parker, supra* note 32, at 1.

### *1. Judicial Economy*

Occasionally an unassigned issue may be found in a case, and similar issues may be found in other cases then in the appellate review process. Identification of the issue by specifying it and then grouping other similar cases permits early resolution of the matter. This may reduce briefing times and eliminate subsequent petitions for reconsideration for cases that counsel have not previously identified as containing the issue. It also permits imposition of the same remedy to a number of cases without further delay. An example is in the situation where the court has found multiplication of charges. By specifying the issue, the court may effect the remedy of dismissal of certain charges deemed legally identical with others or combine such charges into a lesser number. This completes appellate review without further remand or briefing.

### *2. Judicial Consistency*

The concept of judicial consistency is closely related to that just discussed. Because the court historically has been concerned with the uniform application of military justice, it has striven to ensure that all accuseds receive the benefits of recently announced legal principles. The court has often created "lead-trailer" lists to permit the benefits of opinions changing existing practices to be made available to all accuseds in the same or similar situations. This practice, in effect, avoids prospective-only decisions and gathers together all similar cases then in the appellate process.

Because of the mechanical assignment of petitions for staff examination, different staff attorneys may receive cases having similar factual or legal issues. Sometimes the staff may identify such similarities during the preliminary examination and group the cases for consideration by the judges. At other times the judges may grant a petition in one case before similar or related cases "trickle in," and the staff, being aware of the granted issue, will alert the judges to the trend. This often happens before notice of the granted issue is made available to counsel.

An example of this is the *Cruz*<sup>44</sup> series of cases involving the same factual issue. There the *Cruz* opinion of the lower court<sup>45</sup> was well known before that particular case was forwarded for review. The other similar cases were already undergoing staff examination and were grouped for the consideration of the judges. Thus, by the time

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<sup>44</sup>United States v. *Cruz*, 25 M.J. 326 (C.M.A.1987).

<sup>45</sup>United States v. *Cruz*, 20 M.J. 873 (A.C.M.R.1985).

the seminal case reached the court, all of these cases were ready to be presented to the judges for their decision to grant or to deny.

Another example is the *Lee*<sup>46</sup> series of cases involving similar legal issues. Because of the factual differences in these cases and because of the inability of the judges to reach a single resolution of the issues, the “trailer” cases were further divided into groups and the principle announced in the lead case was applied to all, albeit resulting in different remedies occasioned by the factual differences presented.

### 3. “Living Court”

This is essentially a restatement of our previous proposition. Military law has always been growing and changing with the passage of time. The judges are particularly qualified to detect developing issues in the application of the Code. Their awareness is the result of long experience in the military justice field and the independent thinking brought about by their diverse backgrounds and interests and their professional association with other people in the judicial realm.

An example of this is the *Gordon case*,<sup>47</sup> where an issue was specified addressing the practice of allowing a medical expert to sit at the trial counsel’s table during medical testimony by another medical expert. The opinion stated that this issue was specified “because of the increasing use of experts, both government and defense, and the potential use of the experts to the respective counsel. Therefore, we wanted to refresh counsel’s understanding of the rule.”<sup>48</sup>

Another example is the *Grosteefon*<sup>49</sup> case, where the court specified an issue concerning the obligation of the appellate defense counsel to advance issues that the accused requested, even though counsel believed them to lack decisional merit. While the court ultimately affirmed that case—thus vindicating counsel’s professional judgment<sup>50</sup>—military practice was changed to require appellate defense

<sup>46</sup>United States v. Lee, 25 M.J. 457 (C.M.A. 1988).

<sup>47</sup>United States v. Gordon, 27 M.J. 331 (C.M.A. 1989).

<sup>48</sup>*Id.* at 332.

<sup>49</sup>United States v. Grosteefon, 12 M.J. 431 (C.M.A. 1982).

<sup>50</sup>It was, and still is, argued that there should be no responsibility to advance wholly frivolous issues, and that the *Grosteefon* result is purely cosmetic, but the underlying wisdom of that case was subsequently vindicated in *United States v. Knight*, 15 M.J. 202 (C.M.A. 1983). There the accused had indicated in his request for appellate representation that a specification upon which he had been tried and convicted was legally defective. He has so argued at trial but lost. Appellate defense counsel submitted the case on appeal without assignment of issues to the court of military review, which affirmed. Upon further submission to the Court of Military Appeals on the merits, the court staff proposed a specified issue in four parts encompassing the accused’s listed issues. The initially appointed appellate defense counsel withdrew and substitute appellate defense counsel filed a brief addressing the specified issues. Upon review and argument COMA remanded the case with directions to the court of military review.

counsel to at least list in the supplemental brief the issues that the accused desired, and to require the lower court, if those issues were then known, to at least indicate specifically that it had considered those issues.

Since *Grostepon* appellate defense counsel have routinely listed all issues asserted by the accused, and in some instances have submitted briefs in support of them. The court's staff members have been directed to examine all *Grostepon* submissions and to give their comments in the petition memorandum. Not infrequently the judges have asked the staff members to supplement their comments on a particular issue the accused raised, or some aspect of it. In many instances the court has granted review of *Grostepon* issues after modification to conform them to legal style or to identify what aspects of the issues the judges believe have sufficient merit for further review.<sup>51</sup> This, as noted previously, has generated some "Specified issues."

This aspect of the specification practice indicates that the judges consider themselves the final arbiter and protector of the rights of the accused, and it indicates their willingness to take whatever steps are necessary to ensure that the accused was fairly and legally convicted. It further indicates the continued rejection of the concept of the court as a passive "referee" in favor of being a vital and significant part of the military justice system.

### C. JUDGE AND STAFF INTERACTION

In our previous analysis, we found that staff identified about 64% of the total issues that the court subsequently specified, and that the judges identified the issues in the remaining 36% of the cases. These figures should not be read as mutually exclusive; the judges often indicate merely a desire to review a case and leave the drafting of the specific issue to staff (subject to the judges' final approval).<sup>52</sup> However, we have identified four areas where judge input appears to dominate.

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<sup>51</sup>In a recent case COMA has expressed its frustration with appellate defense counsel for submitting issues not litigated below without any evidence to support them. That case involved an assertion by the accused of inadequate representation at trial by failure to call several witnesses on his behalf, COMA said it could not resolve the asserted issue without some assistance from counsel that might include an affidavit from trial defense counsel. *United States v. McGillis*, 27 M.J. — (C.M.A. 1988) (summary disposition).

<sup>52</sup>Naturally there must be at least two judges who agree to grant any issue for review. We should point out that some of these categories appear similar; we have separated them based upon our analysis of the reasons for grant that appeared in the judges' vote sheets.

### *1. An Issue of Interest*

This is probably best elucidated by the *Gordon* case. Because we have previously discussed this matter, we will limit ourselves to the observation that an expression of interest does not necessarily forecast the ultimate disposition of the issue. What it does indicate is the desire of the judges to obtain the benefits of counsel's thinking in the particular area, which may well lie within counsel's particular expertise, and, hence, not readily discernable by staff or chambers' attorneys. Briefing seems to be a simpler and faster means to exploring the implications of the issue.

### *2. Trends*

Occasionally a judge will detect a trend developing within a service, or even within some branch of a service, and will specify an issue to review that trend and its implications. Whether the trend is of decisional significance or not, it can thus be reviewed with the benefit of briefs.

### *3. Inconsistent Service Practice*

Although Congress intended a uniform application of the "Uniform Code," the differing missions of the services often result in the development of differing practices. At times military exigency requires toleration of these differences; at other times there is no apparent reason for them. Counsel for other services may not be aware of such differing practices, and the court, because of its position at the pinnacle of the military justice system, is best able to consider and to approve the better of the practices.

### *4. Reaction to Supreme Court Decisions*

Since the 1984 amendments to the Code, direct access for review in the United States Supreme Court has become possible.<sup>53</sup> However, the court, over its history, has always felt compelled to apply Supreme Court decisions to military law unless they were inapplicable. Often the inherent delay in the appellate review process creates situations where cases pending the court's review contain issues potentially affected by more recent Supreme Court decisions. In such situations, a specified issue and remand, where appropriate, provide an expeditious means to bring such precedents into the military justice system.

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<sup>53</sup>UCMJ art. 67(h).

## ***D. STAFFINPUT***

There are certain, more limited, areas where the staff may properly identify and propose specified issues.

### ***1. Closing the Gap Between Recent Decisions and Cases on File***

The staff is more quickly aware of judicial interest and of the import of opinions circulating within chambers than are outsiders. They are thus able to apply this knowledge to cases then being examined and to identify similar issues for consideration by the judges.

### ***2. Alerting the Court to Trends; Identifying Lead/Trailer Cases***

This is similar to situation 2 above, but differs in that the staff, being the first to examine records of trial, is the first to detect trends in law or in practice. The staff attorneys' composite knowledge enables them to get the "big picture" and to spot trends. On occasion the staff may establish a lead/trailer index even before the judges grant review of an issue. Of course denial of the issue ends the index, but it has happened that an initial denial may be followed by a grant of a subsequent case where the issue has a better factual predicate. This, in turn, requires a review of previous denials to see if correction is necessary to achieve uniformity.

### ***3. Remedy Omissions***

There are, of course, occasional omissions of meritorious issues by appellate counsel. Staff attorneys may choose to recommend a specified issue where they believe the record will support it. This is a basic reason for the existence of the staff. Because there are various reasons (manning levels primarily) why appellate government counsel almost never identify an issue favorable to an accused, practically only the appellate defense counsel provides an examination of the entire record of trial. Even the most skilled counsel, burdened by workload and deadlines, may miss an issue that can be discovered by a staff counsel with more time to spend on the record. Of course, there are instances when both staff attorneys and judges are troubled by a counsel's failure to advance an issue even when the likelihood of relief is slim. This raises the specter of inadequate appellate representation.

## ***E. OTHER COURTS' EXPERIENCES***

We informally contacted five other courts to discover how they handle unassigned issues that the courts have discovered. Each has differing techniques occasioned by different staffing and different

case processing practices. All, however, expose the issues to judicial review.

Although the Fifth Circuit does not have a formal “specifying” process, that court reaches the same result in three ways. First, the judges will allow the case to go forward and then raise the issue in oral argument. Second, if time permits, they will send “questions” to the attorneys involved, asking them why the issue was not raised. Third, they may issue an order asking counsel to address specific aspects of the issue.

When the Second Circuit’s judges discover an issue, they will either ask questions in oral argument or ask for supplemental briefs. Because of their workload, there is not time for prescreening of records or for detailed examination of the briefs.

If the District of Columbia Circuit finds a “trailer” case, the judges will hold the case until they decide the lead case, and then the opinion in that case will address how the trailer case is related to the lead case. In certain instances, even though the specified issue is not framed, the opinion will address it in addition to the assigned issues.

In the District of Columbia Court of Appeals the court issues an order to show cause, framing the specified issue as the basis of the order if briefs are already in. The court uses this practice particularly for lead/trailer cases (why the instant case should or should not be made a trailer to another case).

The Supreme Judicial Court of Massachusetts does not grant specified issues. If counsel do not raise the issue, the court either disposes of it or takes action for counsel to remedy the **error**.<sup>54</sup>

## V. QUALITY OF APPELLATE COUNSEL

As we discussed before, the unwritten fifth part of our opening syllogism was that the specification of issues implies a distrust of the competency of appellate counsel. The obverse of this statement is that present-day appellate counsel are often characterized as being better qualified than those in the “past.” Indeed some of the steps being taken by the court in response to the Rules Committee’s proposals are based upon this premise. Because our cumulative experience includes

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<sup>54</sup>At the All-Services Appellate Military Judge’s Conference, sponsored by the Federal Bar Association and the Court of Military Appeals, on November 9, 1988, a report from the United States Army Court of Military Review indicated 18 cases involved issues specified by that court, and the Air Force noted some **40** cases involved specified issues, for Fiscal Year 1988. It might be noted that in the courts of military review, the first judicial review of a record of trial is accomplished by an appellate military judge, because these courts do not have the benefit of preliminary review by a central legal staff.

some knowledge of the counsel practicing before the Court of Military Appeals in the early to mid 1950's, we decided to examine the rank level of appellate counsel over the years on the assumption that higher rank would indicate greater experience. We selected nine different years, which we believed would be representative of manning levels in the appellate divisions, and randomly selected two cases from each of the three services that listed the counsel briefing and arguing the cases before the court. The results may be summarized succinctly: allowing for the different service practices in assigning appellate counsel and for indicating on the brief the extent of review, there appears to be no significant difference between experience levels of the 1950's and those of today. Except for the fact that there appears to be a greater review by senior officers in the respective appellate divisions today, there is no identifiable trend towards greater or lesser degrees of competence in the quality of appellate representation.

Based on our cumulative experience over the last ten years, it appears that the quality of briefs, though varying, is more an expression of the experience level of the briefers (and reviewers) than that of individual counsel. We believe that the experience level is similarly affected by the rotational cycles of the military services. Thus, every rotation cycle seems to be followed by a decline in quality for a short period while the newly-assigned counsel and their superiors gain requisite appellate skills and develop the instincts to know what may be of interest to the judges. Typically this is followed by a **period** of increasing competence terminated again by the reassignment of skilled personnel and replacement by others not so familiar with the appellate process. To the extent that there is any other variable in this process, it would appear to be occasioned by the experience of the division chief. We have noted that some senior officers bring more skills with them and, hence, in these instances their leadership tends to bridge the experience gap caused by rotation of subordinates.

We do not intend any criticism by our remarks, because the services tend to staff the appellate divisions routinely with personnel of a high level of competence—a fact for which we are especially grateful because it makes the review process at this level far easier. Consequently we conclude that the overall competence of counsel—with very few notable exceptions—is a neutral factor in the consideration of the practices of the court.

## VI. CONCLUSION

The Court of Military Appeals, having been newly created with a broad mandate, chose to track new paths in the creation of a central



legal staff, of adequate size to accomplish the task of examining the record prior to submission to the judges for action. The court has chosen to involve appellate counsel in its search for ultimate justice by specifying issues it finds as a result of its own examination of the record before it. Certainly, it benefits counsel to know at the earliest moment about those aspects of a case which are “troublesome” to the judges. This permits them to focus on the heart of the matter and to avoid the periphery. It also prevents surprise at the oral argument, or, even worse, surprise at the reading of the disposition of the case. Thus, the practice of specifying issues aids both court and counsel, and, we hope, results in achievement of greater justice for both parties to the appeal and to others in the appellate process.

It is in this regard that we differ from the **assertion**<sup>55</sup> that fundamental fairness in military justice does not require that one prison inmate receive the benefit of a successfully asserted issue while another does not. We believe that military due process requires that justice be administered equally and that the result of a successful appeal on a common issue should be accorded to all others convicted notwithstanding the same error. It is of little concern that such considerations may not apply in civilian tribunals; the Court of Military Appeals was created to achieve such uniformity in the application of military justice.

The court deals solely in criminal law, an area directly affecting the life and liberty of its petitioners. Should not the court take that final step to satisfy itself of the legality of the decision before it? It seems an anomaly that we must defend such practices or return to a now superseded eighteenth-century approach to appellate justice. Certainly an accused cannot complain; representatives of the government who are equally tasked to do justice should not object. Further, Congress has indicated no interest in changing this philosophy over the years. It has routinely approved funding for the central staff, which tends to indicate that the court is performing the mission set out for it in the original Code enactment.

Whatever may have been the reason for this historic step, the court’s enhanced examination and identification of issues not otherwise noted has over the years resulted in grants of review by the judges, and, ultimately, disposition in opinions which have enriched the body of military law. Arguments could be made that other appellate courts with crowded dockets might well adopt similar practices. In any event, “It’s worked here, so why change it?”

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<sup>55</sup>See Fidell and Greenhouse, *supra* note 4, at 134-35.



# SHOULD THERE BE A PSYCHOTHERAPIST PRIVILEGE IN MILITARY COURTS-MARTIAL?

by Major David L. Hayden\*

I don't see where you people are going to stop. Pretty soon you won't have anybody left who can testify to anything. We will all be privileged classes, the privileged folks, and then there will be the common people who actually have to go to court and act like American citizens. We will all be chiefs, and no Indians. I think it is crazy.'

## I. INTRODUCTION

The statement illustrates the frustration most people share concerning rules of privilege. Privileges hinder admissibility of relevant evidence that could aid the fact-finder in ascertaining the ultimate truth.' Many modern commentators have described them as encumbrances, originating from competing professional jealousies, impeding the orderly pursuit of truth and serving no important societal goal.<sup>3</sup> Nonetheless, testimonial privileges serve a useful purpose in

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'*Hearings Before The Special Subcomm. On Criminal Justice of The House Subcomm. On The Judiciary*, 93d Cong., 1st Sess. 463 (Comm. Print 1973) (statement of Mr. Dennis) [hereinafter *Hearings*], quoted in C. Wright and K. Graham, *Federal Practice and Procedure: Evidence* § 5422, at 690 (1980) [hereinafter Wright: Evidence].

<sup>2</sup>Oldham, *Privileged Communications in Military Law*, 5 Mil. L. Rev. 17 (1959); 8 J. Wigmore, *Evidence*, § 2196, at 111 (McNaughton rev. 1961) [hereinafter 8 Wigmore]; Wright: Evidence, *supra* note 1, at 676-85; see also 2 J. Weinstein and M. Berger, *Weinstein's Evidence*, § 501(01), at 501-13 (1985) [hereinafter Weinstein, Evidence] (discussing the views of the Advisory Committee in drafting the Federal Rules of Evidence).

<sup>3</sup>C. McCormick, *Evidence* § 77, at 156-57, 159 (2d ed. 1972); 8 Wigmore, *supra* note 2, § 2286, at 532; Wright: Evidence, *supra* note 1, § 5422, at 676. See Note, *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1480, 1493 (1985) [hereinafter *Developments*] (describing the power theory as one basis for privileges); Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 Georgetown L.J. 61, 85 (1973).

preserving the sanctity of confidential relationships that must, in the public interest, be fostered and **protected**.<sup>4</sup> Courts are forced to balance conflicting values when privileges are in issue. They must render an accurate and efficient decision, while attempting to protect the privacy and confidentiality of privilege claimants.<sup>5</sup>

The military justice system recognizes some testimonial privileges as rules of law.<sup>6</sup> Nonetheless, certain privileges are outright rejected. The military has always held a strong antimedical privilege position.<sup>7</sup> Any doctor-patient privilege was considered contrary to the military's interest in maintaining the health and welfare of its personnel.<sup>8</sup> A recent Court of Military Appeals opinion, *United States v. Toledo*,<sup>9</sup> reaffirmed that position.

In *Toledo* a military judge allowed an Air Force psychologist to testify for the government in rebuttal concerning a previous noncompelled examination of the accused, despite defense objection on privilege grounds." The Court of Military Appeals held that the "Military Rules of Evidence recognize no doctor-patient privilege *per se*."<sup>11</sup> Absent from the decision was any reference to a psychotherapist privilege, due in large part no doubt, to the absence of any objection on that ground. The court did identify the attorney-client privilege as an alternative for the defense to prevent disclosure of the psychologist's statements.<sup>12</sup> The issues identified by the *Toledo* court will be analyzed later in this article.

It is essential at this point to identify and define psychotherapy to assist in understanding the complexities of the issue. Psychotherapy involves the treatment by a psychotherapist of mental or emotional

<sup>4</sup>J. Munster and M. Larkin, *Military Evidence* (2d ed. 1978).

<sup>5</sup>Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597 (1980) [hereinafter Saltzburg, *Privileges*].

<sup>6</sup>This is demonstrated by section V of the Manual for Courts-Martial, United States, 1984 [hereinafter cited in text and footnotes as MCM or Manual]. Currently eight specific privileges are enumerated in addition to the general rule, Mil. R. Evid. 501. Additional privileges are located in Mil. R. Evid. 301, 302, and 303. See S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 415 (2d ed. 1986) [hereinafter Saltzburg, *Evidence*].

<sup>7</sup>MCM, United States, 1969 (Rev. ed.), para. 151c; Mil. R. Evid. 501(d) which provides: "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." See also Mil. R. Evid. 501 analysis; W. Winthrop, *Military Law and Precedents* 332 (2d ed. 1920).

<sup>8</sup>Mil. R. Evid. 501 analysis; Saltzburg, *Evidence*, *supra* note 6, at 416.

<sup>9</sup>25 M.J. 274 (C.M.A.), *affd on reconsideration*, 26 M.J. 104 (1988).

<sup>10</sup>*Id.* at 275.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

disorders, including drug and alcohol addiction.<sup>13</sup> For the purposes of this article, a psychotherapist shall be: 1) any person licensed to practice medicine in any state or nation who practices psychiatry all or part of the time; or 2) any person licensed or certified as a psychologist under the laws of any state or nation and who practices clinical psychology all or part of the time.<sup>14</sup> The 1971 draft of the Proposed Federal Rules of Evidence, in Rule **504**, used a broader definition to include persons reasonably believed by the patient to be practicing psychiatry or clinical psychology. This was believed necessary because of the number of people who render similar psychotherapeutic aid but are not psychiatrists or psychologists.<sup>15</sup> That definition creates many potential issues of interpretation and is an unnecessary expansion for purposes of the military.

The law of privilege should also be distinguished from confidentiality. A privilege rule allows an individual to prevent court ordered disclosure of certain communications. Confidentiality refers to a duty, normally an ethical restriction imposed by a professional code, not to engage in gratuitous disclosures of certain communications.<sup>16</sup> The terms often are used interchangeably; yet, they are distinct concepts. This article addresses only the law of privilege. The only confidential communications discussed will be those not intended for disclosure to third persons except when necessary for the patient's diagnosis and treatment. "

The purpose of this article is to address the issue of whether psychotherapists should be allowed any testimonial privilege in military courts-martial. The article begins by exploring several theories currently used to justify existing privileges at common law, and then by applying them to the psychotherapist-patient privilege. This will be followed by a brief analysis of the development of the

<sup>13</sup>This definition is derived in part from the 1971 and 1972 drafts of the Proposed Federal Rule of Evidence, Rule **504** [hereinafter Proposed Rule **504**], 51 F.R.D. 315, 366 (1971); 56 F.R.D. 183, 240 (1972).

<sup>14</sup>This definition is similar to the 1971 draft of Proposed Rule **504**, 51 F.R.D. 315, 366. See also *Developments, supra* note 3, at 1540 (describing how all state statutes concerning psychotherapist-type privileges limit application to those meeting professional licensing standards).

<sup>15</sup>The subsequent 1972 draft of Proposed Rule **504** expanded the definition even further to include general practitioners treating mental or emotional conditions, including drug addiction, and unlicensed therapists engaged in psychotherapeutic aid. 56 F.R.D. at 240-243. These changes to the original draft of Proposed Rule **504** will be discussed later.

<sup>16</sup>See, e.g., *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, § 9, 130 Am. J. Psychiatry, 1058, 1059 (1973) *Ethical Principles of Psychologists*, 36 Am. Psychologist 633, 635-636 (1981).

<sup>17</sup>See, e.g., Appendix C *infra*, para. (a)(3).

privilege under federal and state law. A study of Proposed Federal Rule of Evidence 504 and the current Federal Rule of Evidence 501 will be included. Federal case law development of the privilege will also be traced, including federal statutes. This will be followed by a brief look at state laws creating similar privileges. Next, the article covers the treatment of the privilege under the Military Rules of Evidence and military case law. Finally, the article will discuss the results of an empirical survey of Army psychiatrists that was conducted as research for this article.

Empirical data obtained from Army psychiatrists provided some insight, but surprisingly mixed support for the psychotherapeutic privilege. The survey responses, on the surface, indicated little or no impact on Army psychiatrists' practices from the lack of a privilege. The responses did not appear to support assertions that the privilege would allow Army psychiatrists to treat patients more effectively. After further analysis of the responses, however, the results may have been misleading. A closer look reveals the necessity for some form of a psychotherapist-patient privilege.

There should be a psychotherapist privilege in courts-martial. There is substantial precedent in federal common law and federal practice to support such a rule. Indeed, absent the antimedical privilege language in the Military Rules of Evidence," recognition pursuant to federal common law would be likely. Nonetheless, adoption of a psychotherapist-patient privilege in military courts is unlikely without a regulatory or executive mandate.

## 11. HISTORICAL BASIS FOR PHYSICIAN-PATIENT PRIVILEGE

No doctor-patient privilege existed at common law.<sup>19</sup> Lord Mansfield, addressing the issue at trial in England stated, "If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."<sup>20</sup> Despite this eloquent discourse, variations of the privilege exist today by statute in many forums.<sup>21</sup> The absence of histor-

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<sup>19</sup>Mil. R. Evid. 501.

<sup>19</sup>8 Wigmore, *supra* note 2, §2380, at 818; C. McCormick, *supra* note 3, § 98, at 212; 2 D. Louisell and C. Mueller, Federal Evidence, § 215, at 839 (1985) [hereinafter 2 Louisell]; *Whalen v. Roe*, 429 U.S. 589, 602 n. 28 (1977).

<sup>20</sup>*Dutchess of Kingston's Trial*, 20 How. St. Tr. 355, 573 (1776).

<sup>21</sup>8 Wigmore, *supra* note 2, § 2380, at 819; C. McCormick, *supra* note 3, § 98, at 212;

ical precedent in the English or federal common law has not deterred the states from creating numerous medically related privileges.<sup>22</sup> Indeed, the common law may yet be disposed to recognize such a privilege.<sup>23</sup>

## A. THEORIES JUSTIFYING PRIVILEGES

### 1. The Utilitarian Analysis

Current theories advanced by privilege proponents normally fall within two basic categories. The first is the utilitarian theory.<sup>24</sup> The rationale begins by assuming that nondisclosure of information is not favored unless it furthers some social policy.<sup>25</sup> For example, the attorney-client privilege is accepted because it will encourage clients to be more forthright with their lawyers.<sup>26</sup> The privilege is analyzed in terms of how society is best served. The otherwise unfavorable privilege is tolerated when harm to the confidential relationship from disclosure outweighs any advantage gained in the enhanced likelihood of accuracy in litigation."

The utilitarian analysis is best illustrated by Dean Wigmore's four fundamental criteria:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

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M. Larkin, *Federal Testimonial Privileges*, § 3.01, at 3-1 (1984) [hereinafter *Larkin, Privileges*].

"Appendix A, *infra*; *Developments, supra* note 3, at 1532-1536.

<sup>23</sup>56 F.R.D. at 242 (Advisory Committee's note to the 1972 draft of Proposed Rule 504); See also Note, *Psychotherapist-Patient Privilege under Federal Rule of Evidence 501*, 75 J. Crim. L. and Criminology, 388, 395 (1984) [hereinafter *Psychotherapist-Patient Privilege*].

<sup>24</sup>This type of argument has also been characterized as "pragmatic," 2 Louisell, *supra* note 19, § 201, at 655; "instrumental," Wright: Evidence, *supra* note 1, § 5422, at 670-671; and "traditional," *Developments, supra* note 3, at 1472.

<sup>25</sup>Wright: Evidence, *supra* note 1, § 5422, at 671.

<sup>26</sup>C. Wright and K. Graham, *Federal Practice and Procedure: Evidence*, § 5422.1, at 144 (Supp. 1987) [hereinafter *Wright: Evidence Supp.*].

<sup>27</sup>8 Wigmore, *supra* note 2, § 2285, at 527. See also *Developments, supra* note 3, at 1472.

<sup>28</sup>*Id.*; see also Wright: Evidence, *supra* note 1, § 5422, at 671 (discussing the instrumental justification for privileges); 2 Louisell, *supra* note 19, § 201, at 655-656.

Dean Wigmore argued that privilege recognition can only occur when all four conditions are met.<sup>29</sup> Specifically, he believed that people would continue seeking medical help and not refrain from disclosing confidential information whether or not any privilege existed.<sup>30</sup> Additionally, Dean Wigmore asserted that the injury to accurate litigation would be decidedly greater than any injury to the physician-patient relationship.<sup>31</sup> He concluded that the doctor-patient privilege failed to satisfy either the second or fourth criteria, but never determined if the psychotherapist-patient privilege met each of the four criteria.<sup>32</sup>

The utilitarian analysis is not without its critics. Commentators have argued that it presents a highly conjectural analysis and defies scientific validation.<sup>33</sup> Lack of empirical evidence to support or discredit a privilege under this theory results in speculation and inaccurate conclusions.<sup>34</sup> Even when empirical data exists, the results often fail to support the costs or benefits claimed by privilege opponents and proponents.<sup>35</sup> Critics have also pointed to the absence of personal privacy considerations as a major failing in the utilitarian analysis.<sup>36</sup> Nonetheless, the utilitarian theory remains a valuable starting point in any privilege analysis.<sup>37</sup>

## 2. *The Privacy Analysis*

The second basic theory is the privacy rationale.<sup>38</sup> Privileges are

<sup>29</sup>8 Wigmore, *supra* note 2, § 2285, at 527 and § 2380a, at 828-832.

<sup>30</sup>*Id.* § 2380a, at 829.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* § 2285, at 528. *Contra*, 2 Louisell, *supra* note 19, § 201, at 656 (stating that the four criteria support a psychotherapist-patient privilege and substantially support at least a limited physician-patient privilege).

<sup>33</sup>8 Wigmore, *supra* note 2, § 2380a, at 830.

<sup>34</sup>Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101, 111 (1956) [hereinafter Louisell, *Confidentiality*]. See also *Developments*, *supra* note 3, at 1474-1479 (discussing the problems with any empirical analysis).

<sup>35</sup>Shuman and Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893 (1982) [hereinafter Shuman]; Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226 (1962).

<sup>36</sup>Louisell, *Confidentiality*, *supra* note 34, at 111; Saltzburg, *Privileges*, *supra* note 5, at 618-620.

<sup>37</sup>2 Louisell, *supra* note 19, § 201, at 655-656; see *Psychotherapist-Patient Privilege*, *supra* note 23, at 391-394; Note, *The Case for a Federal Psychotherapist-Patient Privilege that Protects Patient Identity*, 1985 Duke L.J. 1217, 1223 [hereinafter *Case for a Privilege*]; Shuman, *supra* note 35, at 905.

<sup>38</sup>*Developments*, *supra* note 3, at 1480-1483; see Louisell, *Confidentiality*, *supra* note 34, at 101; Saltzburg, *Privileges*, *supra* note 5, at 616-625; C. McCormick, *supra* note 3, § 77, at 157; see also Wright: Evidence, *supra* note 1, § 5422, at 671-672 (characterizing the privacy theory as non-instrumental); 2 Louisell, *supra* note 19, § 201, at 655 (en-



recognized under this theory, not because they satisfied a utilitarian systematic analysis, but because some underlying values involving the individual are more important than increasing the likelihood of an accurate resolution.<sup>39</sup> In other words, the privilege analysis shifts the focus to the individual instead of a balancing examination. Under this rationale, the privilege's primary purpose is to protect an individual from intrusions into certain human relationships. Exclusion of evidence in litigation is simply an incidental consequence of protecting the individual's right to be left alone.<sup>40</sup> The privileges protect interests and relationships, whether right or wrong, because they are of sufficient social importance to justify denial of information to fact finders.<sup>41</sup>

Most commentators advancing the privacy theory find the utilitarian analysis inadequate for some privileges, but they do not ignore its value altogether. The utilitarian analysis "sheds light upon, and indeed wholly justifies, many privileges—especially those which have grown up around professional relationships."<sup>42</sup> Professor Saltzburg proposed a hybrid analysis that evaluated the nonlitigation (quasi-privacy) values first and the litigation (quasi-utilitarian) values last.<sup>43</sup> Another writer proposed encompassing the privacy

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dorsing Dean Wigmore's pragmatic approach for privileges dealing with professional relationships, but emphasizing the need to consider underlying values equally if not more); cf. Wright: Evidence Supp., *supra* note 26, at 145 (it is wrong to suppose that a privacy argument is necessarily noninstrumental).

<sup>39</sup>Louisell, *Confidentiality*, *supra* note 34, at 110.

<sup>40</sup>*Id.*

<sup>41</sup>C. McCormick, *supra* note 3, § 72, at 152.

<sup>42</sup>Louisell, *supra* note 19, § 201, at 655; see Wright: Evidence, *supra* note 1, § 5422, at 672.

<sup>43</sup>Saltzburg, *Privileges*, *supra* note 5, at 601. His two part test provides:

Part I-Nonlitigation values:

- (1) Does the privilege concern a personal relationship or subject that traditionally has received special solicitude from government?
- (2) Has this solicitude involved respect for the privacy of the relationship or information?
- (3) Would reasonable persons asked to provide the information find the relationship threatened by disclosure, or result by disclosure in an unwarranted adverse affect on the person making the privacy claim?
- (4) Is the relationship or privacy claim, though traditional, still valued today?

If the answer to (1)-(4) is yes, then proceed to Part II.

Part II-Litigation values:

- (1) Does the privilege conceal evidence otherwise available to the court?
- (2) If so, is this lost information an acceptable price to pay for nonlitigation gains?

*See also Developments*, *supra* note 3, at 1480 n. 53 (describing how some commentators place privileges into two categories, some justified by the privacy theory and others by the traditional utilitarian approach).

rationale within a full utilitarian framework, finding both compatible.<sup>44</sup> These two combinations still return to the original questions. Which rationale will remain preeminent? Will privacy values overcome society's desire to obtain more information? The method of structuring the analysis would in all likelihood determine the outcome.<sup>45</sup>

The privacy theory is not without its problems either. Commentators argue that a privacy analysis must always be balanced against society's interest in the search for the truth.<sup>46</sup> It is extremely difficult, however, to objectively weigh the privacy interests involved, further complicating any comparison with the costs of denying access to information.<sup>47</sup> Opponents to privacy-based privileges cannot rely on the standard empirical analysis used in utilitarian circles. Instead, they must also demonstrate society's disagreement over what privacy interests are considered worthy of protection against disclosure.<sup>48</sup>

### 3. *The Power Analysis*

Consideration should also be given to the power theory when explaining how privileges have been traditionally justified. It is actually not an academic analysis of why a privilege should exist. Indeed, the power theory asserts that attempting to justify privileges is a waste of time.<sup>49</sup> It is a political perspective on why privileges exist at all. According to the theory, privileges originate from the political influence of those who benefit from them.<sup>50</sup> The power theory has been mentioned by various scholars as one explanation for the existence of privileges.<sup>51</sup> An indicator of this theory's potential influence can be found in the numerous recently passed state privilege statutes, which reflect the power structure of contemporary society.<sup>52</sup> This prompted one scholar to say "the poor man's only privilege is perjury."<sup>53</sup> The power theory offers little in the way of privilege

<sup>44</sup>*Developments*, *supra* note 3, at 1484.

<sup>45</sup>Wright: Evidence, *supra* note 1, § 5422, at 672-673.

<sup>46</sup>*Developments*, *supra* note 3, at 1482; *see* Saltzburg, *Privileges*, *supra* note 5, at 601.

<sup>47</sup>*Developments*, *supra* note 3, at 1483.

<sup>48</sup>*Id.* at 1483 n. 77; *cf.* Wright: Evidence, *supra* note 1, § 5422, at 673 (arguing that any noninstrumental analysis cannot be proved or disproved by any empirical data).

<sup>49</sup>*Developments*, *supra* note 3, at 1493.

<sup>50</sup>*Id.*

<sup>51</sup>Wright: Evidence, *supra* note 1, § 5422, at 675-677; C. McCormick, *supra* note 3, § 77, at 159; 8 Wigmore, *supra* note 2, § 2286, § 2380a, at 532, 831; E. Green and C. Nesson, Problems, Cases, and Materials on Evidence 522, 526 (1983); *cf.* Wright: Evidence Supp., *supra* note 26, at 148.

"Appendix A, *infra* (demonstrates how members of the medical profession have generally received some form of testimonial privilege by most states); Wright: Evidence, *supra* note 1, § 5422, at 675-676.

<sup>53</sup>Wright: Evidence, *supra* note 1, § 5422, at 676 (citing a cynic whose identity was claimed to be privileged); *Developments*, *supra* note 3, at 1450.

analysis, so it will be left at this juncture for some future privilege adventurer.

## ***B. PHYSICIAN VERSUS PSYCHOTHERAPIST***

Critical distinctions exist between the general physician-patient privilege and the psychotherapist-patient privilege. The unusually close relationship of trust and confidence required in psychotherapy demands special considerations unlike those given to ordinary doctor-patient relations.<sup>54</sup> The psychotherapeutic relationship is, by its nature, much more intimate and personal. "Mental ill-health is still a matter of which patients are likely to be more ashamed than physical ill-health or injury."<sup>55</sup> Psychotherapy is useless unless patients feel assured from the beginning that whatever they say will forever remain confidential.<sup>56</sup> The need for confidentiality is important, not only within the therapeutic relationship, but equally so for inducing patients to begin therapy.<sup>57</sup> Patients experiencing physical injury, on the other hand, will normally seek medical treatment regardless of the risk of disclosure. There is little chance of stigmatization in being treated by a general practitioner for a physical injury.<sup>58</sup> The same cannot be said for treatment by a psychotherapist.

It is clear that the psychotherapist-patient situation is distinct in many ways from the physician-patient situation. Indeed, several commentators have compared the psychotherapist-patient relationship to the priest-penitent relationship.<sup>59</sup> "While psychiatry and religion do not share the same orientation or basic assumptions, many of their basic concerns are the same."<sup>60</sup> Communications to clergy in the military are privileged if made either as a formal act of religion or as a matter of conscience.<sup>61</sup> Statements made to

<sup>54</sup>M. Guttmacher & H. Weihofen, *Psychiatry and the Law* 270 (1952) [hereinafter Guttmacher].

<sup>55</sup>*Id.* at 271.

<sup>56</sup>R. Slovenko, *Psychotherapy, Confidentiality, and Privileged Communication* 42 (1966); Weinstein, *Evidence*, *supra* note 2, § 504(03), at 504-15, 16.

<sup>57</sup>R. Slovenko, *supra* note 56, at 43.

<sup>58</sup>8 Wigmore, *supra* note 2, § 2380a, at 829. Someone seeking treatment for a venereal disease or AIDS might disagree.

<sup>59</sup>R. Slovenko, *supra* note 56, at 39; *Case for a Privilege*, *supra* note 37, at 1224; 56 F.R.D. at 242 (Advisory Committee Notes to Proposed Rule 504 quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960)); Note, *Confidential Communications To A Psychotherapist: A New Testimonial Privilege*, 47 Nw. U. L. Rev. 384, 386 (1952) ("Like the confessional, psychotherapy by its very nature is worthless unless the patient feels assured from the outset that whatever he may say will be forever kept confidential."); *cf. Developments*, *supra* note 3, at 1531.

<sup>60</sup>R. Slovenko, *supra* note 56, at 39.

<sup>61</sup>Mil. R. Evid. 503(a).

psychotherapists may also stem from a matter of conscience as well as a desire to be treated for some perceived mental disorder.

### ***C. UTILITARIAN ANALYSIS APPLIED TO PSYCHOTHERAPY***

The psychotherapist-patient privilege presents a much stronger case for acceptance under the utilitarian theory than does the physician-patient privilege. The analysis begins by asking whether a testimonial privilege against disclosure is necessary to encourage communications between psychotherapists and their patients. Applying Wigmore's four postulates to this relationship will aid in the analysis.<sup>62</sup>

First, confidentiality must be considered the cornerstone to a psychotherapist-patient relationship. Unlike the physician who may be able to cure ailments without the patients' trust or communications, the psychotherapist must have the patients' confidence.<sup>63</sup> In few other situations will individuals bare their souls and subject themselves to the mental dissection of another.<sup>64</sup> Communications in the psychotherapist-patient relationship can only originate in confidence that they will not be disclosed.

Second, continued confidentiality is inherent to a complete and successful psychotherapist-patient relationship. Successful treatment usually requires patients to disclose matters that are personal and embarrassing.<sup>65</sup> The therapist has a unique relationship which allows access into the most intimate areas of the mind normally inaccessible to others.<sup>66</sup> The therapeutic relationship must develop over time, building upon past sessions, which allows patients to establish bonds of security and trust in the therapist.<sup>67</sup> If patients suspect dis-

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<sup>62</sup>See *supra* note 28; *supra* notes 24-37 and accompanying text.

<sup>63</sup>Guttmacher, *supra* note 54, at 272-273; Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955).

<sup>64</sup>Louisell, *The Psychologists in Today's Legal World (Pt II, Confidential Communications)*, 41 Minn. L. Rev. 731, 745-746 (1957).

<sup>65</sup>Guttmacher, *supra* note 54, at 272.

The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition.

*Id.*

<sup>66</sup>R. Slovenko, *supra* note 56, at 40.

<sup>67</sup>Guttmacher, *supra* note 54, at 272-273.

closure of their inner thoughts, they may lose all trust in their therapists or even sever the relationship.<sup>68</sup>

Third, the psychotherapist-patient relationship is beneficial to society. These types of services are being used more often now than ever before.<sup>69</sup> If patients knew that their feelings and statements made to therapists could be disclosed in the future, they may delay or avoid altogether seeking necessary treatment for mental illnesses.<sup>70</sup> This harms society in two ways: 1) mentally ill people who pose possible dangers to society are not treated either as soon as possible or at all; and 2) mentally ill people are left with less capacity for productivity in society than mentally fit people.<sup>71</sup> The psychotherapeutic relationship is, therefore, one which should be fostered.

Finally, Wigmore's fourth criterion provides the strongest argument for recognition of the psychotherapist-patient privilege. Disclosure of confidences made in the relationships may not necessarily enhance the accurate disposal of litigation, but harm to the relationships by such action would substantially outweigh any potential benefit. To begin with, statements made in these relations may be fraught with fantasy, imagination, and other unreliable information—of extreme importance to the psychotherapists but potentially dangerous in the courtroom.<sup>72</sup> Litigation accuracy could just as likely be impaired as aided by this additional information. Introduction of unreliable evidence may complicate an already difficult fact finding process. In addition, court ordered disclosure of personal and potentially damaging information poses a serious threat to psychotherapeutic relationships that could exacerbate the mental health of already ill people.<sup>73</sup> Compelling therapists to testify in court also creates double-edged results. Patients, once aware no privilege exists, divulge less critical information to their therapists, thereby decreasing the effectiveness of treatment. Additionally, therapists possess less information that is considered beneficial to the accuracy of litigation by fact-finders. Litigation is just as (in)accurate as before, only now treatment of the mentally ill is adversely affected. Mentally ill people are treated less effectively or not at all.<sup>74</sup>

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<sup>68</sup>R. Slovenko, *supra* note 56, at 43-44.

<sup>69</sup>*Id.* at 46.

<sup>70</sup>*Whalen v. Roe*, 429 U.S. at 602 ("Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention.").

<sup>71</sup>*In Re Zuniga*, 714 F.2d 632, 639 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); *Psychotherapist-Patient Privilege*, *supra* note 23, at 393; *Case for a Privilege*, *supra* note 37, at 1225.

<sup>72</sup>R. Slovenko, *supra* note 56, at 47; *Case for a Privilege*, *supra* note 37, at 1225-1226.

<sup>73</sup>R. Slovenko, *supra* note 56, at 47.

<sup>74</sup>*Id.* at 46. See also *infra* notes 441-449 and accompanying text; Appendix B, question 14.

## D. PRIVACY ANALYSIS APPLIED TO PSYCHOTHERAPY

The psychotherapist-patient privilege, in addition to benefitting society under the traditional utilitarian analysis, is necessary to protect the privacy of patients. It does not matter, under the privacy theory, whether patients will delay or avoid treatment for mental illnesses. What is important is that the individuals' privacy, their innermost thoughts revealed to their psychotherapists in confidence, remain free from intrusion.<sup>75</sup> The exclusion of evidence at trial is only an incidental effect.

The term "privacy" evokes images of ubiquitous clouds that envelop individuals, shielding what is within from the senses of others. We bring into these "cloud" only those to whom we are willing to expose certain personal matters. Few people disagree that we each have certain expectations of privacy that should be protected from the intrusions of others. Disagreement, of course, arises over the size of the privacy "clouds" that society will accept. The privacy theory asserts that confidences revealed in the course of a psychotherapeutic relationship fall within these "clouds" and should be privileged under common law.<sup>76</sup>

Beginning in the 1960's, the United States Supreme Court began to identify and define a constitutional right of privacy, that protects individuals from invasion of some of the most intimate aspects of their lives.<sup>77</sup> This constitutional protection has expanded in several ways. The Court has recognized privacy interests in the following areas: avoiding disclosure of personal information;<sup>78</sup> the individual's right to make decisions without government interference;<sup>79</sup> the individual's right to keep communications confidential;<sup>80</sup> maintaining the sanctity of the individual's body;<sup>81</sup> and certain places in which the

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<sup>75</sup>See *supra* notes 38-48 and accompanying text.

<sup>76</sup>*Id.*

<sup>77</sup>*Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a right of marital privacy).

<sup>78</sup>*Whalen v. Roe*, 429 U.S. 589, 599 (1974); *cf.* *Nixon v. Administrator of General Services*, 433 U.S. 425 (1974) (directing the General Services Administrator to take control of ex-President Nixon's papers and tapes).

<sup>79</sup>*Whalen v. Roe*, 429 U.S. 589, 600 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>80</sup>*Katz v. United States*, 389 U.S. 347, 359 (1967).

<sup>81</sup>*Rochin v. California*, 342 U.S. 165, 173-174 (1952) (forcibly pumping a suspect's stomach violated due process); *see also Developments, supra* note 3, at 1545-1548 (detailed analysis of the constitutional recognition of privacy interests in these areas). *Cf.* *Schmerber v. California*, 384 U.S. 757, 766-772 (1966) (a compulsory blood test did not violate the right of privacy).

individual is located.<sup>82</sup> The "right to be let alone" has been characterized as the most valued right of civilized people.<sup>83</sup>

In the substantial number of Supreme Court decisions in the past twenty years invoking a constitutional right of privacy, no case has established or denied such a right with respect to patient disclosures to psychotherapists. Some state courts, however, have recognized that the psychotherapist-patient privilege is protected from intrusions by the United States Constitution.<sup>84</sup> These decisions imply that privacy may be a constitutionally mandated protection of confidential communications in the psychotherapeutic relationship or, at the least, an expanding concept that should weigh heavily in balancing the various interests of any privilege analysis. The psychotherapist-patient privilege, therefore, finds strong support in the privacy protection emanating from the Bill of Rights in the Constitution.<sup>85</sup>

## 111. PSYCHOTHERAPIST-PATIENT PRIVILEGE: ALIVE AND GROWING

Psychotherapeutic relationships have received increasing recognition as a unique area distinct from general physician-patient relationships. This attention has manifested itself in various ways. Congress gave serious consideration to a proposed psychotherapist-patient privilege when promulgating the Federal Rules of Evidence, before finally selecting a generalized rule of privilege.<sup>86</sup> Federal courts wrestled with the psychotherapist-patient privilege when attempting to identify and define its existence in light of federal common law and Federal Rule of Evidence 501.<sup>87</sup> Even some federal statutes have the effect of according rights similar to a psychotherapist-patient priv-

"United States v. Karo, 468 U.S. 705 (1984); Payton v. New York, 445 U.S. 573 (1980); see also Bowers v. Hardwick, 106 S. Ct. 2841, 2850-51 (1986) (Blackmun, J., dissenting) (privacy right did not extend to homosexual conduct in the home).

<sup>83</sup>Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>84</sup>*In Re* Lifschutz, 2 Cal. 3d 415, 431-432, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970) (California Supreme Court stated that the state evidence code and a federal constitutional right to a "zone of privacy" protects psychotherapist-patient communications); *In Re* B, 482 Pa. 471, 484, 394 A.2d 419, 425 (1978) (the psychotherapist-patient privilege is grounded on the federal and state constitutions).

<sup>85</sup>Winslade and Ross, *Privacy, Confidentiality, and Autonomy in Psychotherapy*, 64 Neb. L. Rev. 578, 598-599 (1985).

<sup>86</sup>S. Rep. No. 1277, 94th Cong., 2d Sess. 4, reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7058-7059 [hereinafter S. Rep. No. 1277].

<sup>87</sup>*In Re* Zuniga, 714 F.2d 632 (6th Cir.), cert. denied, 464 U.S. 983 (1983); United States v. Meagher, 531 F.2d 752 (5th Cir.), cert. denied, 429 U.S. 853 (1976); Flora v. Hamilton, 81 F.R.D. 576, 579 (M.D.N.C. 1978).

ilege in certain situations,<sup>88</sup> although arguments for a court-created psychotherapist-patient privilege are lessened to some degree by the statutes.<sup>89</sup> The states have been the most ardent supporters of the psychotherapist-patient privilege. Many adopted state evidence code sections similar to the proposed federal psychotherapist-patient privilege rule.<sup>90</sup> The current trend in courts and legislatures is toward recognizing the distinctions between psychotherapists and physicians, either by statute or by case law.

## A. DEVELOPMENT OF PRIVILEGES IN THE FEDERAL RULES OF EVIDENCE

Beginning in 1961 the Supreme Court, Congress, noted scholars, and other interested parties spent more than thirteen years developing the current Federal Rules of Evidence.<sup>91</sup> In March 1969 a preliminary draft of the proposed rules of evidence was prepared by an advisory committee and circulated widely for comment.<sup>92</sup> Article V of the draft purported to enumerate all privileges to be recognized in the federal courts. Any unlisted privilege was considered nonexistent and of no effect unless of constitutional dimension.<sup>93</sup> The article contained thirteen rules, nine of which defined specific nonconstitutional privileges, including a psychotherapist-patient privilege.<sup>94</sup> The proposed rules underwent two subsequent revisions in 1971 and 1972 before the Supreme Court transmitted them to Congress in 1973.<sup>95</sup>

It became immediately clear to Congress that the privilege provisions were extremely controversial.<sup>96</sup> Disagreement over the privilege rules threatened to prevent passage of the remaining sections.<sup>97</sup> Ultimately, the privilege section was eliminated and a single rule was substituted in its place.<sup>98</sup> When the Federal Rules of

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<sup>88</sup>42 U.S.C. § 290ee-3 (Supp. IV 1986) (drug abuse prevention); 42 U.S.C. § 242a (1982) (mental health research).

<sup>89</sup>Larkin, Privileges, *supra* note 21, § 3.03, at 3-7 (1984).

<sup>90</sup>See, e.g., Alaska R. Evid. 504 (1979 & 1988 amend.); Haw. R. Evid. 504 (1985); N.M. R. Evid. 504 (1986).

<sup>91</sup>S. Rep. No. 1277, *supra* note 86, at 7051.

<sup>92</sup>*Id.* at 7052.

<sup>93</sup>*Id.* at 7053.

<sup>94</sup>*Id.* at 7058 (Proposed Federal Rule of Evidence 504) [hereinafter Proposed Rule 504]. (The other eight listed privileges included required reports, lawyer-client, husband-wife, communications to a clergyman, political vote, trade secrets, secrets of state and other official information, and identity of informer.)

<sup>95</sup>*Id.* at 7052; see *supra* note 13-15 and accompanying text.

<sup>96</sup>S. Rep. No. 1277, *supra* note 86, at 7053.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.* Fed. R. Evid. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court



Evidence became public law, privileges would henceforth be "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>99</sup> This ostensibly sounded a death knell to the proposed psychotherapist-patient privilege, except for the comments on the rules in the accompanying Senate Report, subsequent federal case law, and state legislation.<sup>100</sup> Their combined effect, which will be discussed later, gave new life to the psychotherapist-patient privilege.

### 1. Proposed Federal Rule of Evidence 504

Proposed Rule 504 did not contain a general physician-patient privilege.<sup>101</sup> The drafters recognized the distinction from psychother-

pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

<sup>99</sup>Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926, 1933 (1975).

<sup>100</sup>S. Rep. No. 1277, *supra* note 86, at 7059; *In Re Zuniga*, 714 F.2d at 632, 637; Appendix A, *infra*.

<sup>101</sup>56 F.R.D. at 240. The rule provides:

(a) DEFINITIONS.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) EXCEPTIONS.

apy, citing the report of the Group for the Advancement of Psychiatry, which provided:

Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. . . . [T]here is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.<sup>102</sup>

The 1971 draft of the rule expanded the definition of psychotherapist to include general physicians when performing psychotherapist-type treatment.<sup>103</sup> This was designed to allow general practitioners who treat psychosomatic conditions part of the time. Expanding the definition, but not requiring physicians to practice psychotherapy more than part of the time, created a quasi-physician-patient privilege, contrary to the original intent of the drafters of Proposed Rule 504.<sup>104</sup>

Psychologists, unlike physicians under the proposed rule, had to be

(1) *Proceedings for hospitalization*. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of judge*. If the judge orders an examination of the mental or emotional condition of the patient communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) *Condition an element of claim or defense*. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

<sup>102</sup>*Id.* at 242 (Advisory Committee's Notes, quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960)).

<sup>103</sup>Weinstein, Evidence, *supra* note 2, § 504(02), at 504-11.

<sup>104</sup>*Id.* at 504-12 to 504-14 (The 1969 draft of the rule required physicians to devote a substantial portion of their time to psychotherapy.).

licensed or **certified**.<sup>105</sup> This removed from protection the wide number of lay persons claiming to provide psychotherapeutic **services**.<sup>106</sup> Sections (b) and (c) of the rule defined confidential communications and the general rule of privilege in terms not unlike other rules of privilege.<sup>107</sup> The final interesting characteristics of Proposed Rule **504** were the three exceptions to the general rule of privilege: proceedings for hospitalization of the patient; testimony based on court ordered examinations of the patient's mental or emotional condition; and cases in which the patient's mental or emotional condition is in issue.<sup>108</sup> The first two exceptions would be inappropriate for military court-martial proceedings for two reasons. First, courts-martial have jurisdiction to try only criminal cases, not to conduct hearings for involuntary hospitalization. Second, other military evidence rules address disclosure of statements made at compelled mental examinations.<sup>109</sup> Additionally, the unique nature of the military system may require additional exceptions before it could be acceptable.

The adoption of the Federal Rules of Evidence created an important issue regarding the role of the proposed-but-rejected psychotherapist-patient privilege in determining whether such a privilege exists under federal common law. The rule represented years of effort by distinguished and capable men and is therefore entitled to a certain degree of respect.''' Conversely, opponents to the privilege argued that rejection by Congress of the specific rule was equally significant.''' Indeed, there was some evidence that the proposed rule was considered unsatisfactory to physicians and patients alike, which contributed to the dilemma Congress faced prior to the rule's **demise**.<sup>112</sup> But a close review of the Senate Report on deletion of the psychotherapist-patient privilege lessens to some extent this argument.

Congress simply avoided controversy and selected the easier route by deleting the privilege section, expediting passage of the remaining rules. This action was indicative of impatience rather than opposition to the rule. This impatience was due in large part to the strong lob-

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<sup>105</sup>See 56 F.R.D. 240, at para. (a)(2).

<sup>106</sup>Weinstein, Evidence, *supra* note 2, § 504(02), at 504-12.

<sup>107</sup>See Mil. R. Evid. 502 (lawyer-client); Mil. R. Evid. 503 (communications to clergy).

<sup>108</sup>See *supra* note 101, at para. (d).

<sup>109</sup>Mil. R. Evid. 302 prevents disclosure of any statements made by an accused during a mental examination ordered pursuant to the MCM, 1984, Rule for Courts-Martial 706 [hereinafter R.C.M. 706].

<sup>110</sup>Louisell, *supra* note 19, § 201, at 668-670.

<sup>111</sup>*Id.*

<sup>112</sup>S. Rep. No. 1277, *supra* note 86, at 7053.

bying effort of medical groups to be included within the proposed rule.<sup>113</sup>

**Proposed Rule 504** was not criticized because psychotherapists were granted a privilege. On the contrary, it was attacked because it was not broad enough. Speaking before the House Subcommittee on Criminal Justice, one spokesperson representing the American Orthopsychiatric Association, the American Psychological Association, and the National Association of Mental Health argued that the rule was too restrictive; it gave no protection to physicians or unlicensed psychotherapists.<sup>114</sup> This was contrary to the laws of two-thirds of the states at that time.<sup>115</sup> She argued that the federal law of privileges should be left to the states rather than risk losing what privileges currently existed in the federal courts.<sup>116</sup> A member of the Subcommittee, Representative Dennis of Indiana, went so far as to admit to Congress that the privileges were matters of substantive law rather than simply rules of evidence, and that they should be left to the states to decide instead of being codified in the rules of evidence.<sup>117</sup> This is certainly a different reason than offered by the Senate for replacing the rules, namely to avoid a stalemate in the passage of the entire package.''' The clear thrust of these comments and those of other witnesses to the hearings was a fear that the proposed rule would preclude application in federal courts of all state physician-patient privileges already in place.<sup>119</sup> The medical community wanted a broader rule or no rule at all, thus accepting nothing less than what they already possessed.

Ignored in the debate, but of particular importance to this article, was the bifurcated nature in which the privilege rules were applied. Proposed Rule 504 was written to provide uniform application in both civil and criminal federal trials. State rules of privilege would normally be of concern only in federal civil cases involving federal questions or diversity jurisdiction.<sup>120</sup> They would have no direct impact on rules of evidence in federal criminal trials, because only federal law would apply. The medical community had no explicit privilege protec-

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<sup>113</sup>S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual 231* (3d ed. 1982) (editorial explanatory comment) [hereinafter Saltzburg, *Federal Evidence*].

<sup>114</sup>*Hearings, supra* note 1, at 449-450 (Patricia Wald testifying).

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>120 Cong. Rec. 1409 (1974) (Representative Dennis was the author of the quotation that began this article).

<sup>118</sup>S. Rep. No. 1277, *supra* note 86, at 7053.

<sup>119</sup>*See Hearings, supra* note 1, at 546-578.

<sup>120</sup>S. Rep. No. 1277, *supra* note 86, at 7058; 28 U.S.C. § 1332 (1982); *Erie v. Tompkins*, 304 U.S. 64 (1938).

tion in federal criminal forums to begin with. Congress may have satisfied the medical community by rejecting Proposed Rule **504**, but it simultaneously removed the only explicit psychotherapist-patient privilege provided for federal criminal courts. This perspective should lessen to some extent arguments that the proposed-but-rejected rule is of little significance today in analyzing psychotherapist-patient privileges under the common law in federal criminal trials.

Proposed Rule **504** is a valuable starting point in any federal common law analysis for another important reason. Following the rule's demise, Congress received substantial correspondence from psychiatric organizations and **psychiatrists**.<sup>121</sup> The psychiatric profession was concerned that Congress was removing any possible psychotherapist-patient privilege in the federal courts. Clarification by Congress was immediate and to the point. The Senate Report accompanying the Federal Rules of Evidence stated:

[I]n approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a [psychotherapist-patient privilege] . . . or any other of the enumerated privileges contained in the Supreme Court rules. . . . [T]he recognition of a privilege based on a confidential relationship and other privileges should be determined on a case by case basis.<sup>122</sup>

Proposed Rule **504** is, therefore, a worthwhile source of information in shedding light on any federal common law psychotherapist-patient privilege analysis.

## 2. Federal Rule of Evidence 501

The general privilege embodied in Federal Rule of Evidence 501 could be accurately characterized as Congressional **side-stepping**.<sup>123</sup> It was drafted by the House Subcommittee to replace the original **13** privilege rules that the Supreme Court transmitted to Congress.<sup>124</sup> The Senate Report accompanying FRE 501 stated that it was created because disagreement over the proposed privilege rules threatened passage of the remaining rules.<sup>125</sup> In addition, lobbying efforts of

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<sup>121</sup>S. Rep. No. 1277, *supra* note 86, at 7059.

<sup>122</sup>*Id.*

<sup>123</sup>See *supra* note 98.

<sup>124</sup>H.R. Rep. No. 650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7075, 7082 [hereinafter H. Rep. No. 650].

<sup>125</sup>S. Rep. No. 1277, *supra* note 86, at 7058; *cf.* 120 Cong. Rec. 1409 (1974) (a member of the subcommittee that drafted FRE 501 to replace the 13 enumerated rules stated that evidence privileges were matters of substantive law that should be left to the states).

various interest groups contributed to the dissension.<sup>126</sup> The new rule returned privilege law to its previous status.<sup>127</sup> Congress wanted the federal courts to continue the evolution of testimonial privileges in federal criminal trials. They were to be governed by the principles of the common law as they may be interpreted in the “light of reason and experience.”<sup>128</sup> Congress did not intend to freeze the law of privilege by rejecting the proposed rules and enacting FRE 501. Instead, its purpose was to insert flexibility in the courts to allow development of the rules of privilege.<sup>129</sup>

Traditionally, federal courts have decided issues of privilege in criminal trials in accordance with the guidance of FRE 501.<sup>130</sup> This means that those privileges recognized prior to the development of the Federal Rules of Evidence were still valid. In addition, the courts were encouraged to continue the development of privileges on a case-by-case basis.<sup>131</sup> The actual effect has been to slow, but not to stop, development of the psychotherapist-patient privilege.

FRE 501 prescribes a general privilege for any “witness, person, government, State, or political subdivision” in federal criminal proceedings.<sup>132</sup> In federal civil actions involving “an element of a claim or defense as to which State law supplies the rule of decision,” state privilege would apply unless some overriding federal interest existed.<sup>133</sup> When federal criminal courts enforce federal law, FRE 501 requires application of federal privilege law instead.<sup>134</sup> This article will only discuss FRE 501’s application to criminal cases, consistent with the criminal jurisdiction of military courts.

### 3. Federal Case Law

The psychotherapist-patient privilege has received mixed reviews in the federal courts. Some try to avoid the issue and rule on other grounds.<sup>135</sup> Courts that fail to recognize a psychotherapist-patient

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<sup>126</sup>*Id.*

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*; Trammel v. United States, 445 U.S. 40, 47 (1980) (application of FRE 501 to the marital privilege); S. Rep. No. 1277, *supra* note 86, at 7058.

<sup>129</sup>Trammel, 445 U.S. at 47.

<sup>130</sup>Saltzburg, Federal Evidence, *supra* note 113, at 229.

<sup>131</sup>S. Rep. No. 1277, *supra* note 86, at 7059.

<sup>132</sup>*Supra* note 98.

<sup>133</sup>*Id.*; *In Re* Pebsworth, 705 F.2d 261, 262 (7th Cir. 1983).

<sup>134</sup>*Id.*

<sup>135</sup>United States v. Crews, 781 F.2d 826, 831 (10th Cir. 1986) (defendant waived any potential psychotherapist-patient privilege); *In Re* Doe, 711 F.2d 1187, 1193 (2d Cir. 1983) (no real psychotherapist-patient relationship existed); United States v. Alvarez, 519 F.2d 1036, 1046 n.13 (3d Cir. 1975) (treatment of the accused by a psychiatrist was to assist the defense counsel, not for purpose of diagnosis or treatment); United States

privilege normally do not distinguish psychotherapists from physicians. Their analysis would concern whether a physician-patient privilege existed. Since there was no physician-patient privilege at common law, they saw little reason to recognize one, even for psychotherapists.<sup>137</sup> These decisions in general add little to any privilege analysis because they fail to search beneath the surface and discuss the principles involved in psychotherapy.

Today, many courts have recognized that the psychotherapist-patient relationship is unique and worthy of more deliberation than the general physician-patient relationship.<sup>138</sup> These courts analyzed its complexities, cognizant of the principles involved. These decisions have primarily discussed the issue in terms of privilege or privacy rights,<sup>139</sup> similar to the utilitarian and privacy theories espoused earlier.<sup>140</sup> Additionally, when Proposed Rule 504 was considered by Congress and ultimately replaced with FRE 501, many courts gave greater attention to the proposed-but-rejected rule.<sup>141</sup>

In order to resolve whether a psychotherapist-patient privilege should exist in the military justice system, it is necessary to determine how the better reasoned federal court decisions have treated the issue. The cases have varied among Proposed Rule 504, Wigmore's utilitarian theory, and privacy arguments in their analysis, usually in some combination of the three.

*Ex Rel.* Edney v. Smith, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (1977) (the psychiatrist-patient privilege, if any, did not apply to the facts of the case). See Annotation, *Psychotherapist-Patient Privilege Under Federal Common Law*, 72 A.L.R. Fed. 395 (1985).

<sup>136</sup>*United States v. Lindstrom*, 698 F.2d 1154, 1167 n.9 (11th Cir. 1983); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976); *United States v. Harper*, 450 F.2d 1032, 1035 (5th Cir. 1971); *Ramer v. United States*, 411 F.2d 30, 38 (9th Cir.), *cert. denied*, 396 U.S. 965 (1969).

<sup>137</sup>See *Harper*, 450 F.2d at 1035; *Ramer*, 411 F.2d at 39.

<sup>138</sup>*In Re Zuniga*, 714 F.2d at 638 (quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960)); *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting M. Guttmacher and H. Weihofen, *Psychiatry and Law* (1952)); *Ex Rel Edney*, 425 F. Supp. at 1043; *Calloway v. Marvel Entertainment Group*, 110 F.R.D. 45, 49 (1986).

<sup>139</sup>*In Re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3d Cir.), *cert. denied*, 107 S. Ct. 3233 (1987); *Zn Re Doe*, 711 F.2d at 1193; *United States v. Lindstrom*, 698 F.2d at 1167; *United States v. Friedman*, 636 F. Supp. 462 (S.D.N.Y. 1986).

<sup>140</sup>*Supra* notes 24-48.

<sup>141</sup>*In Re Zuniga*, 714 F.2d at 636; *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549, 550 (N.D. Ill. 1984); *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978); *Lora v. Board of Education*, 74 F.R.D. 565, 584-587 (E.D.N.Y. 1977). See also *Meagher*, 531 F.2d at 753 (although not recognizing a psychotherapist-patient privilege, the court still looked to Proposed Rule 504 for its analysis).

## (a) In Re Zuniga

The most significant federal case concerning the psychotherapist-patient privilege is *In Re Zuniga*.<sup>142</sup> This was the first federal appeals court to bestow common law status to the privilege.<sup>143</sup> In the case two psychotherapists were held in civil contempt for failing to respond to a subpoena duces tecum issued by two separate grand juries.<sup>144</sup> The records were sought in relation to investigations of alleged fraud in Blue Cross-Blue Shield billings.<sup>145</sup> The Sixth Circuit affirmed the contempt judgments, holding that information pertaining to patient identity, treatment dates, and length of treatment was not protected by the psychotherapist-patient privilege, nor did the subpoena unconstitutionally infringe on privacy rights.<sup>146</sup> The decision is most important for its analysis and recognition of the privilege, despite not enforcing the privilege in the particular circumstances of the case.

The Sixth Circuit relied on the legislative history of Proposed Rule 504 to a great extent in creating a basis in federal common law to recognize the psychotherapist-patient privilege.<sup>147</sup> The judges were not impeded in their analysis by congressional rejection of Proposed Rule 504. Instead, they viewed the new generalized rule, FRE 501, as a mandate to continue developing testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience."<sup>148</sup> This provided greater flexibility to the courts to develop rules of privilege on a case-by-case basis.<sup>149</sup>

The Zuniga court also pointed to the position of the states as another factor in its analysis.<sup>150</sup> Almost every state has shown a willingness to recognize some form of physician-patient, psychologist-patient, or psychotherapist-patient privilege.<sup>151</sup> In federal criminal trials, federal law controls, but the Supreme Court has indicated ("that the privilege law as developed in the states is [not] irrelevant,"

<sup>142</sup>714 F.2d 632 (6th Cir.), cert. denied, 464 U.S. 983 (1983).

<sup>143</sup>*Id.* at 639.

<sup>144</sup>*Id.* at 634.

<sup>145</sup>*Id.*

<sup>146</sup>*Id.* at 640, 642.

<sup>147</sup>*Id.* at 636-639; cf. Note, *Evidence—The Psychotherapist-Patient Privilege. The Sixth Circuit Does the Decent Thing: In Re Zuniga*, 33 U. Kan. L. Rev. 385 n.81 (1985) (the court failed to anticipate arguments that Proposed Rule 504 is irrelevant since Congress rejected it) [hereinafter *Sixth Circuit Does the Decent Thing*].

<sup>148</sup>*Id.* at 637 (quoting *Trammel v. United States*, 445 U.S. 40, 48 (1980)).

<sup>149</sup>*Id.*

<sup>150</sup>714 F.2d at 638-639.

<sup>151</sup>Appendix A, *infra*.



and “has taken note of state privilege laws in determining whether to retain them in the federal **system**.”<sup>152</sup> If almost every state recognizes some form of psychotherapist-patient privilege, federal common law analysis cannot ignore this direct reflection of the importance society places in the relationship. Military law, despite readiness concerns unique to its mission, must give similar credence to this trend.

Another part of the *Zunigu* opinion offered a noteworthy utilitarian analysis. As discussed earlier, Wigmore’s four privilege criteria provided the traditional utilitarian **framework**.<sup>153</sup> The *Zunigu* panel never explicitly addressed Wigmore’s conditions. Yet, in a two step analysis, they accomplished just that.

First, the court determined whether a privilege should be recognized under the federal common law, addressing Wigmore’s second, third, and fourth **conditions**.<sup>154</sup> The court acknowledged the need for confidentiality in the psychotherapist-patient relationship, citing the comment of the Advisory Committee Notes, which stated, “confidentiality is the *sine qua non* for successful **treatment**.”<sup>155</sup> Society’s interest in fostering the relationship was twofold: it allowed for successful treatment of mentally ill persons to reduce the threat to the community; and it enabled individuals to actively enjoy life and exercise many fundamental **freedoms**.<sup>156</sup> Considering the states’ positions, legislative history of the privilege rules, and the comments of many scholars, the court found that “these interests . . . outweigh the need for evidence in the administration of criminal **justice**.”<sup>157</sup> Having implicitly answered Wigmore’s last three conditions affirmatively, the court concluded that a psychotherapist-patient privilege was mandated by “reason and **experience**.”<sup>158</sup>

The *Zunigu* court then performed the second step in its analysis to determine the scope of the newly recognized privilege. Again, implicitly, the court conducted a utilitarian analysis using Wigmore’s first and fourth **conditions**.<sup>159</sup> The information sought in the subpoena included patient identity, facts, and time of **treatment**.<sup>160</sup> This informa-

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<sup>152</sup>*In Re Zuniga*, 714 F.2d at 639 (quoting *United States v. Gillock*, 445 U.S. 360, 369 n.8 (1980)).

<sup>153</sup>*Supra* note 28 and accompanying text.

<sup>154</sup>*Id.*

<sup>155</sup>*In Re Zuniga*, 714 F.2d at 639 (quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960) in 56 F.R.D. at 242).

<sup>156</sup>*Id.* at 639.

<sup>157</sup>*Id.*

<sup>158</sup>*Id.*

<sup>159</sup>*Supra* note 28 and accompanying text.

<sup>160</sup>*Id.* at 640.

tion did not constitute the type of communication a patient would expect to remain confidential, because it had already been revealed to a third party, Blue Cross-Blue Shield.<sup>161</sup> Wigmore's fourth condition then served as the panel's basis for its decision. In weighing all relevant competing interests, the court determined that disclosure of the information was not harmful to the psychotherapeutic relationship, because it did not violate any assurance to the patients that their innermost thoughts would remain confidential.<sup>162</sup> The *Zuniga* opinion demonstrated that the utilitarian analysis is still a valid tool in any privilege analysis.<sup>163</sup>

*Zuniga* raised an alternative issue concerning whether a constitutional right of privacy attaches to the psychotherapist-patient relationship.<sup>164</sup> The court used a balancing test drawn from the Supreme Court's decision in *Whalen v. Roe* to hold that enforcement of the subpoenas did not unconstitutionally infringe on the patients' rights.<sup>165</sup> Specifically, the intrusion into the patient's privacy interest was outweighed by the need for the grand jury to conduct its investigation.<sup>166</sup> The court left open for further speculation the way in which the scales would tip should the information be used as evidence in a criminal trial.<sup>167</sup> Indeed, the privacy argument would be much stronger against disclosure if the privileged information were offered in open court. Such a distinction might exist in the military justice system if similar information were sought for an article 32 hearing versus a court-martial, although article 32 hearings do not retain the veil of secrecy attending grand jury proceedings.

*Zuniga* provides a modern example of the correct psychotherapist-patient privilege analysis to be conducted. It reflects a detailed review of the most important factors to be considered. Unfortunately, few other cases have conducted as detailed an analysis.

#### (b) *Other Federal Cases*

##### (1) *Proposed Rule 504*

Proposed Rule 504 and its legislative history appeared in several other federal cases analyzing the psychotherapist-patient privilege.

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<sup>161</sup>*Id.*; *In Re Pebsworth*, 705 F.2d 261, 262 (7th Cir. 1983).

<sup>162</sup>*Id.* at 640.

<sup>163</sup>*Cf. Sixth Circuit Does the Decent Thing*, *supra* note 147, at 396-397 (stating that the *Zuniga* court only addressed a few of Wigmore's queries, **but** the article fails to state which ones).

<sup>164</sup>*In Re Zuniga*, 714 F.2d at 641.

<sup>165</sup>*Id.* at 641-642 (citing *Whalen v. Roe*, 429 U.S. 589, 603-607 (1976)).

<sup>166</sup>*Id.*

<sup>167</sup>*Id.* at 642 n.11.

In *United States v. Meagher* the Fifth Circuit declined to recognize a physician-patient privilege concerning incriminating letters a defendant sent to his psychiatrist.<sup>168</sup> The court, unfortunately, made no distinction between physicians and psychotherapists.<sup>169</sup> It did, however, find that if Proposed Rule 504 had been adopted by Congress, the letters would have been expressly excepted from the privilege when the defendant raised an insanity defense.<sup>170</sup> The Fifth Circuit only refused to recognize the physician-patient privilege. It remains to be seen whether different facts will prompt that circuit to summarily dismiss the privilege again. The panel evidently recognized that the history of Proposed Rule 504 contributed to the common law analysis of privileges. Indeed, why would the panel discuss Proposed Rule 504 at all unless its history has some bearing on the common law analysis of privileges?

The most accurate statement concerning Proposed Rule 504's status in federal court privilege analysis is that "it still provides a useful standard from which analysis can proceed."<sup>171</sup> The rule provides strong guidance necessary to formulate the new privilege, using FRE 501 as the authority for federal court recognition.<sup>172</sup> One must simultaneously recognize that evidentiary privileges are not to be created lightly nor expansively construed because they inhibit the search for the truth.<sup>173</sup>

## (2) Utilitarian Analysis

Other federal courts have also found the utilitarian theory useful in their analysis. In a Second Circuit opinion, *In Re Doe*, the panel refused to prevent disclosure of psychotherapist-patient files where the relationships failed to satisfy Wigmore's four requirements.<sup>174</sup> Specifically, the court focused on the fourth condition and determined, based on an in camera inspection by the trial court, that there were no communications in the files of the intensely personal nature that were designed to be protected by the psychotherapist-patient privilege.<sup>175</sup> In another case, *United States v. Friedman*, the defen-

<sup>168</sup>531 F.2d 752 (5th Cir.), cert. denied, 429 U.S. 853 (1976).

<sup>169</sup>*Id.* at 753.

<sup>170</sup>*Id.*; see Proposed Rule 504(d)(3), 56 F.R.D. at 241.

<sup>171</sup>*Lora v. Board of Ed. of City of New York*, 74 F.R.D. 565, 584 (E.D.N.Y.1977).

<sup>172</sup>*Id.* at 569; *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C.1978).

<sup>173</sup>*In Re Zuniga*, 714 F.2d at 637-638 (citing *United States v. Nixon*, 418 U.S. at 711).

<sup>174</sup>711 F.2d 1187, 1193 (2d Cir. 1983).

<sup>175</sup>*Id.* (arguably these conditions could obtain in a true psychotherapist-patient relationship); see *In Re Grand Jury Subpoenas Duces Tecum*, 638 F. Supp. 794, 796 (D. Me. 1986).

dant in a criminal trial subpoenaed psychiatric records of anticipated witnesses against him.<sup>176</sup> The district court concluded that the material sought was "the type of intensely personal communications that the psychotherapist-patient privilege [was] designed to protect."<sup>177</sup> Contrary to the *In Re Doe* case, the court found all four of Wigmore's conditions satisfied, holding that the records were protected by the psychotherapeutic privilege.<sup>178</sup>

### (3) *Privacy Analysis*

The Supreme Court has recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."<sup>179</sup> This protection has been described involving two different kinds of interests: the individual interest in preventing disclosure of personal matters; and the individual interest in making important decisions free from government intrusion.<sup>180</sup> Although still largely undefined, the right of privacy could include the doctor-patient relationship. In *Roe v. Wade*, the court implicitly included the doctor-patient relationship within the "zone" when it first recognized the right of privacy in a woman's decision "whether or not to terminate her pregnancy."<sup>181</sup>

The Court was more explicit in *Doe v. Bolton*, bringing the doctor-patient relationship within the sphere of privacy when it struck down a Georgia statute that attempted to unduly restrict a physician's judgment in dealing with patients regarding the abortion decision.<sup>182</sup> "The woman's right to receive medical care in accordance with her licensed physician's best judgement and the physician's right to administer it are substantially limited by this [statute]."<sup>183</sup> The Court recognized that a right of privacy protects intimate relationships when certain topics are involved. The logic in extending the right of privacy to the doctor-patient relationship when intimate topics are discussed is consistent with, though not mandated by, Supreme Court case law. In *Paris Adult Theatre I v. Slaton*, the Court

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<sup>176</sup>636 F. Supp. 462 (S.D.N.Y. 1986).

<sup>177</sup>*Id.* at 463.

<sup>178</sup>*Id.*

<sup>179</sup>*Roe v. Wade*, 410 U.S. 113, 152 (1972).

<sup>180</sup>*Whalen v. Roe*, 429 U.S. 589, 599-600 (1976).

<sup>181</sup>410 U.S. at 153.

<sup>182</sup>410 U.S. 179, 197; see also 410 U.S. at 219-220 (Douglas, J., concurring) ("This [statute] is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.").

<sup>183</sup>*Id.* at 197; see also *Roe v. Ingraham*, 403 F. Supp. 931, 936 (S.D.N.Y. 1975), *rev'd* sub nom., *Whalen v. Roe*, 429 U.S. 589 (1976) (extending the right of privacy to the doctor-patient relationship in accordance with the trial court's reading of *Roe v. Doe*).

stated: "[T]he constitutionally protected privacy of family, marriage, motherhood, procreation and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office."<sup>184</sup>

This implicit constitutional right of privacy includes both the individual's right to prevent disclosure of confidential communications in the relationship and the individual's right to make decisions concerning psychiatric care without government interference.<sup>185</sup> The Supreme Court decisions concerning privacy focused primarily on home and family; however, it would be too restrictive a reading of precedent to not include personal communications made pursuant to the physician-patient relationship.<sup>186</sup> Arguments asserting a constitutional right of privacy in the physician-patient relationship are more persuasive where the relationship is between the psychotherapist and his patient.<sup>187</sup> The particularized need for trust and confidentiality is deeply rooted in the relationship. Psychotherapists engage in communications with patients that are likely to be intimate and extremely personal." The psychotherapist-patient relationship should, therefore, be included within the constitutionally protected right of privacy.<sup>189</sup>

This privacy right is not, however, an absolute protection.<sup>190</sup> The analysis still focuses on the individual, although certain interests may become "sufficiently compelling," causing constitutional protection to yield.<sup>191</sup> These encroachments must still be narrowly drawn to reflect only those compelling interests that justify intrusion into constitutionally protected relationships.<sup>192</sup> In the abortion decision, government interests did not become "compelling" until the fetus was capable of meaningful life outside the mother's womb.<sup>193</sup>

Lower courts have paid close attention to the "compelling" stan-

<sup>184</sup>413 U.S. 49, 66 n.13 (1972).

<sup>185</sup>*Hawaii Psychiatric Soc., Dist. Branch v. Ariyoshi*, 481 F. Supp. 1028, 1039 (D. Haw. 1979).

<sup>186</sup>*Roe v. Ingraham*, 403 F. Supp. at 937; *Ex Rel. Edney*, 425 F. Supp. at 1042-1043; *contra*, *Felber v. Foote*, 321 F. Supp. 85, 88 (D. Conn. 1970).

<sup>187</sup>*Ex Rel. Edney*, 425 F. Supp. at 1043.

<sup>188</sup>*Id.* at 1043-1044.

<sup>189</sup>*See Caesar v. Mountanos*, 542 F.2d 1064, 1067 n.9 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *United States v. Layton*, 90 F.R.D.520, 526 (N.D. Cal. 1981); *cf.* *Krattemacher*, *supra* note 3, at 90 ("Claims that the Constitution compels recognition . . . of a doctor-patient privilege cannot be dismissed cavalierly").

<sup>190</sup>*Roe v. Wade*, 410 U.S. at 154; *see also Carey v. Population Services International*, 431 U.S. 678, 686 (1976); *Whalen*, 429 U.S. at 603-604.

<sup>191</sup>*Roe v. Wade*, 410 U.S. at 155; *Carey*, 431 U.S. at 686.

<sup>192</sup>*Roe v. Wade*, 410 U.S. at 155.

<sup>193</sup>*Id.* at 163.

dard in assessing challenges to the psychotherapist-patient privilege. In *United States v. Lindstrom* the court recognized the privacy interest in communications and medical records flowing from a psychotherapeutic relationship.<sup>194</sup> Nonetheless, the court waived the privilege in the face of another compelling constitutional protection, the right of a defendant to cross-examine effectively a witness in a criminal case.<sup>195</sup> In another case a broadly drafted state statute allowing issuance of warrants to search offices and records of medicaid providers was struck down, because the statute as drafted was unnecessary to support the "compelling" state interest to ensure services and supplies that were billed were actually provided.<sup>196</sup>

In a related case, the Third Circuit extended the right of privacy to employees' medical records.<sup>197</sup> The government sought access to the records pursuant to the Occupational Safety and Health Act to facilitate research and investigations.<sup>198</sup> The court made note of the intimate and personal facts normally contained within medical records in distinguishing the case from the authorized government intrusion of *Whalen v. Roe*.<sup>199</sup> In *Whalen* the Supreme Court upheld a New York statute requiring physicians to provide a form identifying patients and other personal information every time a dangerous legitimate drug (Schedule II) was prescribed.<sup>200</sup> Recognizing the special character of this type of information, the court, nonetheless, conceded that the privacy protection must yield upon a showing of a proper (compelling) governmental interest.<sup>201</sup> Such compelling government interests could include reporting requirements relating to "venereal disease, child abuse, injuries caused by deadly weapons, and certification of fetal death."<sup>202</sup>

In *Westinghouse* the court identified several factors to consider in determining whether an intrusion into an individual's privacy is justified. These included

the type of [information] requested, the information it does or might contain, the potential for harm in any subsequent

<sup>194</sup>698 F.2d 1154, 1167 (11th Cir. 1983).

<sup>195</sup>*Contra*, *United States v. Brown*, 479 F. Supp. 1247, 1253-1257 (D. Md. 1979) (denying defendant access to witness's psychiatric records to aid in cross-examination because it was irrelevant and an unwarranted invasion of the witness's privacy).

<sup>196</sup>*Hawaii Psychiatric Soc.*, 481 F. Supp. at 1041-1042.

<sup>197</sup>*United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

<sup>198</sup>*Id.* at 570.

<sup>199</sup>*Id.* at 577.

<sup>200</sup>410 U.S. at 589.

<sup>201</sup>*Westinghouse*, 638 F.2d at 577 ("Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life.").

<sup>202</sup>*Id.* at 578 (citing *Whalen*, 429 U.S. at 602 n.29).

nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate articulated public policy, or other recognizable public interest militating toward access.<sup>203</sup>

The court eventually granted access because the government interest in investigation outweighed the individual privacy interest.<sup>204</sup>

The value placed on the individual's right to prevent disclosure of personal information manifested in these decisions suggests an additional firm policy basis for the psychotherapist-patient privilege. Certainly, the more personal and intimate nature of the psychotherapeutic relationship earns greater deference and consideration when balanced against competing governmental interests at stake. Even in the military justice arena, individual privacy interests **are** legally relevant and should be accorded significant weight in any analysis concerning establishment or recognition of a psychotherapist-patient privilege.

The federal court cases demonstrated some reluctance to recognize a psychotherapist-patient privilege under FRE 501, and even more reluctance to use it as a shield to prevent disclosure. They have, however, uniformly demonstrated recognition that the unique nature of the psychotherapeutic relationship merits closer scrutiny. No longer can courts risk ignoring the distinctions from the general physician-patient relationship. The legislative history of Proposed Rule 504, growing acceptance of the mental health profession, state action in this privilege area, and constitutional privacy arguments all serve to signal the federal courts that summary dispositions of privilege arguments will no longer suffice. Every court will, ultimately, have to deal with psychotherapeutic issues and demonstrate better reasoning before dismissing the psychotherapist-patient privilege's application.

Similar concerns must be addressed in military courts. In Military Rule of Evidence 501(a)(4), military courts are explicitly directed to consider common law principles applied in federal courts pursuant to FRE 501 "insofar as the application of such principles in trial by courts-martial is practicable and not contrary to or inconsistent with the code, [the] rules, or [the] Manual."<sup>205</sup> It may appear that the lan-

<sup>203</sup>*Id.*; *In Re Search Warrant (Sealed)*, 810 F.2d 67, 72 (3d Cir.), cert. denied, 107 S. Ct. 3233 (1987).

<sup>204</sup>*Westinghouse*, 638 F.2d at 580; see *In Re Search Warrant*, 810 F.2d at 73 (physician's medical records could be seized pursuant to a search warrant during a criminal investigation into possible insurance fraud).

<sup>205</sup>Mil. R. Evid. 501(a)(4).

guage restricts the creation of new privileges, but it does not prevent their recognition altogether. Indeed, one commentator has noted that the constant development of privilege law in federal courts will most likely result in similar changes in military privilege law.<sup>206</sup>

#### 4. Indirect Federal Statutory Recognition

Several federal statutes protect the confidentiality of patients and their medical records when being treated for mental illness or drug dependency.<sup>207</sup> Their enactment may lessen the need for federal courts to create privileges in those areas. That argument reflects only a superficial reading of the federal statute's provisions, however. Their passage attests to the perceived need for confidentiality of personal medical information. The lawmakers apparently felt that the potential harm from public disclosure of this information merited additional safeguards in the laws.

For example, the Surgeon General may authorize persons engaged in research for mental health, including research on the use and effect of alcohol and psychoactive drugs, to withhold from anybody not connected to the research information concerning the identity or other characteristics of subjects in the research.<sup>208</sup> Such persons cannot be compelled to provide that information in any "Federal, State, or local civil, criminal, administrative, legislative, or other proceeding."<sup>209</sup>

Another statute ensures the confidentiality of medical records, diagnosis, prognosis, and treatment of any person enrolled in a drug abuse prevention program conducted, regulated, or in any way assisted by any agency or department of the government.<sup>210</sup> It is interesting to note that this statute did not apply to interchange of records within the armed forces, although certain Army regulations have the same effect.<sup>211</sup> Congress provided additional guarantees of confidentiality for mentally ill persons in Public Law 99-319.<sup>212</sup> The Act included a section detailing a "Bill of Rights" for anyone receiv-

<sup>206</sup>Saltzburg, Evidence, *supra* note 6, at 417.

<sup>207</sup>*Supra* note 88 and accompanying text.

<sup>208</sup>42 U.S.C.A. § 242a(a) (West 1982).

<sup>209</sup>*Id.*

<sup>210</sup>42 U.S.C.A. § 290ee-3 (West Supp. 1987); *see also* 42 U.S.C.A. § 260(d) (West 1982) (precluding from use in any court the records of admission and treatment of anyone with a drug problem who voluntarily applies to the Surgeon General and is accepted for treatment in any United States Public Health Service Hospital).

<sup>211</sup>Army Reg. 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 6-3 (3 Nov. 1986) [hereinafter AR 600-85] (Limited Use Policy).

<sup>212</sup>"Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 100 Stat. 478 (1986).



ing mental health services in any program or **facility**.<sup>213</sup> Such persons are to be guaranteed confidentiality of their mental health care records pursuant to that **treatment**.<sup>214</sup> The confidentiality remains in force even after the patient's discharge from a program or **facility**.<sup>215</sup>

These statutes do not explicitly create a psychotherapist-patient privilege; nonetheless, that is how they are **perceived**.<sup>216</sup> They also represent a concern of the legislature to protect people undergoing drug rehabilitation or mental health care. There are two dangers inherent in the programs absent any guarantees of confidentiality. Individuals undergoing the treatment could suffer embarrassment, stigma, or other harm from public disclosure of their participation. Additionally, the effectiveness and ultimate success of the programs would be threatened if people did not use the services for fear of disclosure. Society wants to punish wrongdoers who use drugs or engage in other criminal activities due to some psychosis. Society also benefits from rehabilitating drug users and treating mentally ill individuals. These statutes represent one way in which Congress has sought to tip the scales away from punishment toward more treatment and rehabilitation. This is particularly necessary in the absence of codified rules of evidence protecting these types of relationships. The states, on the other hand, have been much more direct in addressing these problems.

## ***B. STATE PSYCHOTHERAPIST-PATIENT PRIVILEGE LAWS***

The states have responded more quickly to the problems of confidentiality in medical health relationships. Beginning with New York in 1828, the first of many privilege statutes for physician-patient relationships was **created**.<sup>217</sup> The absence of a physician patient privilege at common law did not deter this movement. Today a total of forty states plus the District of Columbia have statutes or rules of evidence recognizing a general privilege in physician-patient relationships.<sup>218</sup> The trend is even more dramatic in the field of psychotherapy. Forty-eight states and the District of Columbia currently have statutes or rules of evidence recognizing a psy-

<sup>213</sup>*Id.* § 201, 100 Stat. at 485.

<sup>214</sup>*Id.* § 201(1)(H), 100 Stat. at 486.

<sup>215</sup>*Id.* § 201(2)(B), 100 Stat. at 487.

<sup>216</sup>*United States v. Howes*, 22 M.J. 704, 707 n.5 (A.C.M.R. 1986).

<sup>217</sup>8 Wigmore, *supra* note 2, § 2380, at 819.

<sup>218</sup>Appendix A (Alabama, Connecticut, Florida, Kentucky, Maryland, Massachusetts, New Mexico, South Carolina, Tennessee, and West Virginia have no physician-patient privilege).

chiatrist-patient, psychologist-patient or psychotherapist-patient privilege.<sup>219</sup>

The statutes and evidentiary rules differ widely in their formulation of the privileges, which often include many exceptions.<sup>220</sup> A common thread among most state schemes, however, is a preference to give psychotherapists more protection than physicians against disclosure. For example, some states grant physicians a privilege in civil trials while giving psychotherapists both civil and criminal trial privilege.<sup>221</sup> Additionally, many states include provisions that equate the psychotherapist-patient privilege with their attorney-client privilege.<sup>222</sup> Very few states, however, give similar protection to their physician-patient privilege.<sup>223</sup> These trends demonstrate that the states recognize two very important points. First, the psychotherapeutic relationship deserves greater protection from disclosure than the general physician-patient privilege. Second, the psychotherapist-patient relationship needs trust and secrecy in communications, similar to that in the attorney-client relationship, in order to be effective in treating the patient.<sup>224</sup>

Another prevalent theme in the state provisions is the almost wholesale adoption of the psychotherapist-patient privilege contained in the proposed federal rules. Proposed Rule 504, deleted by Congress, was amended and placed into the 1974 Uniform Rules of Evidence as Rule 503.<sup>225</sup> The amendment allowed states an option to include a physician-patient privilege consistent with the original Proposed Rule 504.<sup>226</sup> Most states duplicated major portions of that rule into their provisions.<sup>227</sup>

<sup>219</sup>*Id.* (only South Carolina and West Virginia have no such privilege); *In Re Zuniga*, 714 F.2d at 638-639.

<sup>220</sup>Shuman, *supra* note 35, at 907-913; *Developments, supra* note 3, at 1532, 1539-42; Weinstein, Evidence, *supra* note 2, § 504(08), at 504-31 to 504-44.

<sup>221</sup>Appendix A (those states include Alaska, Arizona, California, Montana, Pennsylvania, and Utah).

<sup>222</sup>*See, e.g.*, Ala. Code § 34-26-2 (1985); Ariz. Rev. Stat. Ann. § 32-2085 (West 1986); Ga. Code Ann. § 24-9-21 (1982); Ga. Code Ann. § 43-39-16 (Supp. 1986); Iowa Code Ann. § 622.10 (West Supp. 1987); Kan. Stat. Ann. § 74-5323 (Supp. 1987); N.H. Rev. Stat. Ann. § 330:A:19 (Supp. 1986); N.Y. Civ. Prac. Law § 4507 (McKinney Supp. 1988); Pa. Cons. Stat. Ann. § 5944 (Purdon 1982); Tenn. Code Ann. § 63-11-213 (1986); Utah Code Ann. § 58-25-8 (1986); Wash. Rev. Code Ann. § 18.83.110 (1978).

<sup>223</sup>*See, e.g.*, N.H. Rev. Stat. Ann. § 329:26 (Supp. 1986); Wyo. Stat. § 1-12-101(a)(i) (1987).

<sup>224</sup>8 Wigmore, *supra* note 2, § 2290 and 2291, at 542, 545.

<sup>225</sup>Weinstein, Evidence, *supra* note 2, § 504(08), at 504-31; *see also* Federal Rules of Evidence for United States Courts and Magistrates [including] Uniform Rules of Evidence 255-299 (West 1979) [hereinafter Uniform Rules] (the Uniform Rules of Evidence were approved by the National Conference of Commissioners on Uniform State Laws in August 1974).

<sup>226</sup>*Id.* at 504-32, 533.

<sup>227</sup>*See, e.g.*, Alaska R. Evid. 504 (1979 & 1988 amend.); Ark. Stat. Ann. § 16-41-101,

As previously stated, the proposed rule reflected substantial thought and efforts by renowned attorneys. It is, therefore, no surprise that the states relied on that work to such a great extent. State reliance on the proposed rule gives greater weight to arguments that the proposed rule should be an important factor in any psychotherapist-patient privilege analysis.

Exceptions to any privilege rule tend to neutralize its effectiveness. Every time a privilege rule is abrogated because of an overwhelming compelling interest, the relationship suffers. The state medical health privileges contain numerous exceptions, arguably lessening to some extent the perceived social value placed on the privilege. There was substantial agreement among the states with the drafters of Proposed Rule 504 that in three instances, the need for disclosure outweighed any possible impairment of the psychotherapist-patient relationship.<sup>228</sup> These included proceedings for hospitalization of the patient, court-ordered examinations, and cases where the patient's medical condition was an element of his claim or defense.<sup>229</sup>

Noticeably absent from Proposed Rule 504 was an exception for instances of identified or suspected child abuse.<sup>230</sup> It was probably not even considered as an exception at the time because public attention to child abuse was not as focused as it is today. The states, on the other hand, have already dealt with this issue in their statutes and rules. Today, every state and the District of Columbia have laws requiring psychotherapists and physicians, among others, to report to the appropriate authorities any circumstance where they reasonably believe a child has been neglected or abused or is about to be neglected or abused.<sup>231</sup> All of these statutes supersede any protection afforded by the medical privilege statutes. Additionally, many states

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Unif. R. Evid. 503 (1987); Del. Unif. R. Evid. 503 (1987); Fla. Stat. Ann. § 90.503 (West 1979); Hawaii R. Evid. 504 (1985); Me. R. Evid. 503 (1987); Nev. Rev. Stat. §§ 49.215, 49.225 (1986); N.M. R. Evid. 504 (1986); N.D. R. Evid. 504 (Supp. 1987); Okla. Stat. Ann. tit. 12, § 2503 (West Supp. 1988); Vt. R. Evid. 503 (1983 & Supp. 1987).

<sup>228</sup>56 F.R.D. at 244 (Advisory Committee's Note to Proposed Rule 504).

<sup>229</sup>*See supra* note 101.

<sup>230</sup>*Id.*

<sup>231</sup>Ala. Code § 26-14-3 (1986); Alaska Stat. § 47.17.020 (1984); Ariz. Rev. Stat. Ann. § 13-3621 (West Supp. 1987); Ark. Code Ann. § 12-12-504 (1987); Cal. Penal Code § 11166.5 (West Supp. 1988); Colo. Rev. Stat. § 19-10-104 (1986); Conn. Gen. Stat. Ann. § 17-38a (West Supp. 1987); Del. Code Ann. tit. 16, § 903 (1983); D.C. Code Ann. § 2-1352 (1981); Fla. Stat. Ann. § 4125.512 (Supp. 1987); Ga. Code Ann. § 19-7-5 (1982); Haw. Rev. Stat. § 350-1.1 (Supp. 1987); Idaho Code § 16-1619 (Supp. 1987); Ill. Rev. Stat. ch. 23, para. 2054 (Smith-Hurd 1987); Ind. Code § 35-46-1-13 (1985); Iowa Code Ann. § 232.69 (West Supp. 1987); Kan. Stat. Ann. § 39-1402 (1986); Ky. Rev. Stat. § 199.335 (Michie/Bobbs-Merrill Supp. 1986); La. Rev. Stat. Ann. § 14-403 (West 1986); Me. Rev. Stat. Ann. tit. 22, § 4011 (Supp. 1987); Md. Fam. Law Code Ann. § 5-903 (1984); Mass. Gen. Laws Ann. ch. 119, § 51A (West Supp. 1987); Mich. Comp. Laws Ann. § 722.623 (West Supp. 1987); Minn. Stat. Ann. § 626.556 (West Supp. 1988); Miss. Code Ann. §

explicitly abrogate those privileges when child abuse is involved.<sup>232</sup> Societal concern for our children's welfare has become a compelling state interest that will overcome any utilitarian or privacy arguments for upholding a conflicting psychotherapist-patient privilege. If Congress or the military should consider and ultimately adopt a psychotherapeutic privilege, it would be essential to include as an exception any confidential communications relating to suspected or anticipated child abuse.

Child abuse is but one example of how the states do not let the psychotherapist-patient privilege shield information from the courtroom when a compelling interest is at stake. Another frequent waiver of the psychotherapist-patient privilege occurs when the therapist reasonably believes that the patient is a menace to himself or to others. Normally, the privilege is explicitly waived by statute or rule, but usually the psychotherapist is given an affirmative duty to report the threat to an appropriate authoritative agency.<sup>233</sup> Many psychotherapists are especially sensitive to this requirement because of the risk of litigation when a patient follows through on his expressed impulse.<sup>234</sup> Some states abrogate the psychotherapist-patient privilege when serious criminal misconduct is potentially involved, such as gunshot wounds<sup>235</sup> and homicide.<sup>236</sup> Other exceptions occur when

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43-21-353 (Supp. 1987); Mo. Ann. Stat. § 210.115 (Vernon 1983); Mont. Code Ann. § 41-3-201 (1987); Neb. Rev. Stat. § 28-711 (1985); Nev. Rev. Stat. § 432B.220 (Supp. 1987); N.H. Rev. Stat. Ann. § 169-C: 29 (Supp. 1986); N.J. Stat. Ann. § 9:6-8.10 (West 1986); N.M. Stat. Ann. § 32-1-15 (1986); N.Y. Soc. Svcs. Law § 413 (McKinney Supp. 1988); N.C. Gen. Stat. § 7A-543 (1986); N.D. Cent. Code § 50-25.1-03 (Supp. 1987); Ohio Rev. Code Ann. § 2151.42.1 (Page Supp. 1987); Okla. Stat. Ann. tit. 21, § 846 (West Supp. 1988); Or. Rev. Stat. § 418.750 (1983); 11 Pa. Cons. Stat. Ann. § 2204 (Purdon Supp. 1987); R.I. Gen. Laws § 40-11-3 (Supp. 1987); S.C. Code Ann. § 20-7-510 (Law Co-op. 1985); S.D. Codified Laws Ann. § 26-10-10 (Supp. 1987); Tenn. Code Ann. § 37-1-403 (Supp. 1987); Tex. Fam. Code Ann. art. 34.01 (Vernon Supp. 1988); Utah Code Ann. § 78-3b-3 (1987); Vt. Stat. Ann. tit. 33, § 683 (Supp. 1987); Va. Code Ann. § 63.1-248.3 (1987); Wash. Rev. Code Ann. § 26.44.030 (Supp. 1987); W. Va. Code Ann. § 49-6A-2 (1986); Wis. Stat. Ann. § 48.981(2) (1987); Wyo. Stat. § 14-3-205 (1987).

<sup>232</sup>See, e.g., Ariz. Rev. Stat. Ann. § 46-453 (West Supp. 1987); Cal. Evid. Code § 15637 (West Supp. 1988); Colo. Rev. Stat. § 19-10-112 (1986); Fla. Stat. Ann. § 425.512 (Supp. 1987); Haw. Rev. Stat. § 350-5 (Supp. 1987); Idaho R. Evid. 503 (1987); Ind. Code § 34-1-14-5 (1986); Iowa Code Ann. § 232.74 (West 1985); Minn. Stat. Ann. § 595.02(2) (West Supp. 1988); Mont. Code Ann. § 41-3-201 (1987); N.C. Gen. Stat. § 8-53.1 (Supp. 1987); Tex. Fam. Code Ann. art. 34.04 (Vernon 1986); Utah Code Ann. § 78-3b-13(4) (1987). See also *Developments, supra* note 3, at 1539.

<sup>233</sup>See, e.g., Cal. Evid. Code I 1024 (West 1966); Conn. Gen. Stat. Ann. § 52-146f (West Supp. 1987); Fla. Stat. Ann. § 491.0187 (Supp. 1987); Mass. Gen. Laws Ann. ch. 233, § 20B (West 1986 & Supp. 1987); Minn. Stat. Ann. § 148.975 (West Supp. 1988).

<sup>234</sup>See *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (Supreme Court of California held that therapists have a duty to exercise reasonable care in protecting persons threatened by their patients); *Developments, supra* note 3, at 1541.

<sup>235</sup>See, e.g., Minn. Stat. Ann. § 625.52 (West Supp. 1988).

<sup>236</sup>See, e.g., D.C. Code Ann. § 14-307 (1981 & Supp. 1987); Ill. Rev. Stat. ch. 110,

the elderly<sup>237</sup> or mentally incompetent are the victims of abuse.<sup>238</sup> Finally, some states give the trial judge discretion to disallow the privilege in unique situations. For example, North Carolina and Virginia allow their trial courts to disallow valid psychologist-patient and physician-patient privileges if disclosure is necessary to a proper administration of justice.<sup>239</sup>

The psychotherapist-patient type privileges have become substantive rules of evidence in most of the states. Their existence creates expectations in both patients and therapists in their relationships. It is very likely that many of them are unaware that those same privileges do not explicitly exist in federal criminal proceedings or courts-martial. Perhaps ignorance of this fact means that no chilling effect occurs in the psychotherapeutic relationships. That would lessen to some extent the utilitarian arguments in favor of the privilege. There would be, however, an egregious intrusion on the privacy of the relationship when disclosure is ultimately required where the parties relied on state privilege law in their therapy.

Several points can be drawn from the state-by-state treatment of the psychotherapist-patient relationship. First, as stated earlier, there is overwhelming support for the privilege in society today. All but two states have adopted one form or another of the psychotherapeutic privilege. Second, deletion of Proposed Rule 504 by Congress did not diminish its value as a starting point in any psychotherapist-patient privilege analysis. Indeed, many states relied on the proposed rule as a basic framework upon which to build their own rules. This fact underscores the need to avoid dismissing the proposed rule out of hand without first addressing it, a consideration absent from military courts-martial.<sup>240</sup>

Third, an absolute psychotherapist-patient privilege is impractical. The states recognize at least four situations where the privilege gives way to stronger countervailing interests every time.<sup>241</sup> The unique

para. 8-802 (Smith-Hurd Supp. 1987); Ind. Code § 25-33-1-17 (Supp. 1987); Wis. R. Evid. 905.04 (1987).

<sup>237</sup>See, e.g., Ariz. Rev. Stat. Ann. § 46-453 (West Supp. 1987); Fla. Stat. Ann. § 415.109 (West Supp. 1987); Kan. Stat. Ann. § 39-1402 (1986); Mass. Gen. Laws Ann. ch. 19A, § 15 (West Supp. 1987); Minn. Stat. Ann. § 626.557 (West Supp. 1988); Mont. Code Ann. § 53-5-511 (1987).

<sup>238</sup>See, e.g., Com. Gen. Stat. Ann. § 19a-458a (West Supp. 1987); Neb. Rev. Stat. § 27-504 (1985).

<sup>239</sup>N.C. Gen. Stat. § 8-53.3 (Supp. 1987); Va. Code Ann. § 8.01-399 (1984).

<sup>240</sup>See, e.g., *United States v. Toledo*, 25 M.J. at 275.

<sup>241</sup>These include the three exceptions to Proposed Rule 504, *supra* note 101, and confidential communications concerning child abuse.

needs of a forum may also dictate further exceptions. For example, the military interest in protecting the nation may necessitate a provision allowing the military judge to waive the privilege if nondisclosure would be detrimental to the national security.<sup>242</sup> It must be remembered, however, that each exception to a privilege rule tends to frustrate the purpose of the rule.

Finally, the disparity of treatment in psychotherapeutic communications between state and federal forums allows inequitable situations to develop. Anytime individuals seek treatment for mental or emotional disorders, regardless of how innocuous their behavior, the potential for embarrassing disclosures is always present. If the patients are witnesses or defendants in federal criminal trials, this intimate and personal information will be hanging over their heads, subject to being admitted into evidence as long as it is relevant for the purpose for which it is offered. Any competent advocate can articulate a plausible basis to overcome that hurdle. Conversely, there is precious little that opposing advocates can do to stop this intrusion unless they are in one of the forums that recognize the privilege under FRE 501. There must come a time when the relentless pursuit of all relevant information in a criminal trial has to give way in order to allow individuals an opportunity to receive the most beneficial and effective therapy possible. In the military the dogged pursuit rarely yields.

## **IV. TREATMENT OF PSYCHOTHERAPY UNDER THE MILITARY RULES OF EVIDENCE**

### ***A. ANTIMEDICAL PRIVILEGE BIAS OF THE MILITARY***

The military has always been explicit and intransigent in its non-recognition of any physician-patient privilege. Every Manual for Courts-Martial contained a provision making this patently clear.<sup>243</sup>

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<sup>242</sup>See generally Mil. R. Evid. 505 (classified information is privileged from disclosure if disclosure would be detrimental to the national security).

<sup>243</sup>See, e.g., Manual for Courts-Martial, United States, 1917 (Rev. ed.), para. 231-232 (communications from officers and soldiers and medical officers not privileged; communications between civilian physicians and patients not privileged); Manual for Courts-Martial, United States, 1928 (Rev. ed.), para. 123c (Communications to medical officers and civilian physicians not privileged); Manual for Courts-Martial, United States, 1951, para. 151c(2) (communications to medical officers and civilian physicians not privileged); Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 151c(2) (same provision as in the 1951 Manual with minor grammatical changes); MCM, 1984, Mil. R. Evid. 501(d) (text is located *supra* note 7).

Maintenance of the health and fitness of soldiers was considered paramount over such a privilege.<sup>244</sup> Another factor in the military's opposition to a physician-patient privilege was undoubtedly the lack of a similar privilege at common law.<sup>245</sup> Military Rule of Evidence 302 created an apparently limited medical privilege regarding compelled mental examinations of an accused; yet, the drafters stated very clearly that it was not a doctor-patient privilege.<sup>246</sup> Furthermore, physician-patient privilege laws were also described as inapplicable in the military forum.<sup>247</sup> Instead, the real purpose of Rule 302 was to protect the accused's privilege against self-incrimination.<sup>248</sup>

There would be no chance of recognizing a privilege for psychotherapists if the Military Rules of Evidence were fixed in stone. Fortunately, military law is not so intractable to resist the forces of social change when they are compelling.

The fundamental basis upon which all rules of evidence must rest . . . is their adaptation to the successful development of the truth. . . . [A] rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.<sup>249</sup>

The doctor-patient privilege rejected in military law represents too broad of a stroke. There is room to consider a narrower medical privilege for psychotherapists.<sup>250</sup>

### *1. Blurring Psychotherapist-Patient Distinctions*

The military has never analyzed the distinction between psychotherapists and physicians. Psychiatrists are medically licensed physicians by education and have uniformly been treated as general

<sup>244</sup>Mil. R. Evid. 501 analysis.

<sup>245</sup>Winthrop, *supra* note 7, at 331-332; United States v. Shaw, 26 C.M.R. 47, 49 (C.M.A. 1958) (when the defense asserted that a Navy psychiatrist was precluded from testifying pursuant to a psychiatrist-patient privilege, the Court of Military Appeals stated that the privilege does not exist absent a statute).

<sup>246</sup>Mil. R. Evid. 501 analysis.

<sup>247</sup>*Id.* See also United States v. Johnson, 47 C.M.R. 402, 406 (C.M.A. 1973) (the question of privilege is governed by the law of the forum).

<sup>248</sup>Mil. R. Evid. 302 analysis.

<sup>249</sup>Funk v. United States, 290 U.S. 371, 381 (1933) (common law rule preventing a spouse from testifying on behalf of other spouse in a criminal case was struck down); *cf.* United States v. Leach, 22 C.M.R. 178 (C.M.A. 1956).

<sup>250</sup>Saltzburg, Evidence, *supra* note 6, at 417.

practitioners.<sup>251</sup> Psychologists, on the other hand, are normally not medically licensed. More likely, they possess a graduate degree in psychology, such as a Ph.D.<sup>252</sup> Military courts have sometimes considered psychologists lacking in the training and experience necessary to testify about an individual's mental or emotional condition.<sup>253</sup> Psychologists have, however, recently achieved substantial recognition for their abilities. Previously, each medical board conducting a mental examination had to include at least one psychiatrist.<sup>254</sup> Under the 1986 amendment to the Manual, a mental evaluation board can now be conducted without a psychiatrist, using a clinical psychologist on the board instead.<sup>255</sup> Clinical psychologists are, in essence, accorded equal status with psychiatrists when conducting mental examinations pursuant to R.C.M. 706.<sup>256</sup> This is a significant acknowledgement in military law of the status and ability of clinical psychologists. Because of the change, military psychologists can be expected to testify more frequently on the issue of mental competency.<sup>257</sup>

## 2. Common Scenarios

Psychotherapist-patient communications have usually been offered into evidence in three instances: first, when the accused has undergone a compelled mental examination for the government;<sup>258</sup> second, when the accused has his own psychotherapist on the issue of mental competency;<sup>259</sup> and third, when an individual has been treated by a psychotherapist under circumstances unrelated to the mental com-

<sup>251</sup>See *United States v. Parker*, 15 M.J. 146 (C.M.A. 1983); *United States v. Johnson*, 47 C.M.R. 402, 406 (C.M.A. 1973); *United States v. Shaw*, 26 C.M.R. 47 (C.M.A. 1958).

<sup>252</sup>See, e.g., *United States v. Welch*, 25 M.J. 23 (C.M.A. 1987) (statements made to psychologists are admissible under Mil. R. Evid. 803(4)); *United States v. White*, 25 M.J. 50 (C.M.A. 1987).

<sup>253</sup>*United States v. Fields*, 3 M.J. 27, 29 (C.M.A. 1977); *United States v. Moore*, 15 M.J. 354, 360-361 (C.M.A. 1983); cf. Mil. R. Evid. 702 (enacted after these two cases, providing a much lower threshold for qualification as an expert).

<sup>254</sup>R.C.M. 706(c)(1) (changed by C3, 3 March 1987).

<sup>255</sup>MCM, *United States*, 1984, Rules for Courts-Martial 706 analysis (C3, 3 March 1987) (1986 amendment modified the rule to mirror the similar use of clinical psychologists under federal law) [hereinafter R.C.M. 706 analysis].

<sup>256</sup>*Id.*

<sup>257</sup>See generally *United States v. Moore*, 15 M.J. at 360 ("American judicial opinion is divided on the qualifications of a psychologist, as distinguished from a psychiatrist, to testify to the mental or emotional state of an individual and the impact of the particular state on the individual's behavior.") (citing *United States v. Fields*, 3 M.J. 27 (C.M.A. 1977)).

<sup>258</sup>See, e.g., *United States v. Parker*, 15 M.J. 146 (C.M.A. 1983); *United States v. Johnson*, 47 C.M.R. 402 (C.M.A. 1973).

<sup>259</sup>See, e.g., *United States v. Toledo*, 25 M.J. 270 (C.M.A.) *aff'd on reconsideration*, 26 M.J. 104 (1988); *United States v. Wimberley*, 36 C.M.R. 159 (C.M.A. 1966); *United States v. Shaw*, 26 C.M.R. 47 (C.M.A. 1958).



petency issue but now relevant on some other basis.<sup>260</sup> In the first instance, the Military Rules of Evidence have made special allowances because of the obvious conflict between absence of a doctor-patient privilege and the constitutional protection against self-incrimination.<sup>261</sup> Military Rule of Evidence 302 allows the government to obtain access to the only reliable evidence concerning the accused's sanity.<sup>262</sup> Simultaneously, restrictions are placed on the use of that evidence to protect the accused's right against self-incrimination.<sup>263</sup>

In the second instance, a psychotherapist-patient privilege is normally not an issue when the accused first offers the evidence at trial. In that case the accused has opened the door to his mental competency and waived any privilege that arguably existed.<sup>264</sup> The psychotherapist-patient privilege could apply, however, when the accused does not open the door and the government attempts to introduce such evidence anyway.<sup>265</sup>

Finally, the third instance presents the situation most likely to implicate a psychotherapist-patient privilege. Once an individual has sought treatment from a civilian or military psychotherapist, those subsequent communications and records are subject to disclosure in a military court, unless privileged in some way.<sup>266</sup> The greatest fears of privacy advocates are threatened in this instance. Clearly, no skeleton buried in the closet is safe from a military court-martial once discussed in a psychotherapeutic relationship. Additionally, proponents of the utilitarian theory would submit that the harm to individuals from these disclosures would far outweigh any benefits accorded to the pursuit of truth in a court-martial.

## ***B. THE MILITARY RULES OF EVIDENCE***

### ***1. Generally***

Since 1950 military courts have been statutorily directed to conform their procedures and modes of proof to principles of law and

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<sup>260</sup>*See, e.g.*, United States v. Reece, 25 M.J. 93 (C.M.A.1987); United States v. White, 25 M.J. 50 (C.M.A. 1987); United States v. Wimberley, 36 C.M.R. 159 (C.M.A. 1966); United States v. Shaw, 26 C.M.R. 47 (C.M.A.1958).

<sup>261</sup>*See* Mil. R. Evid. 302(a); R.C.M. 706 (c)(5).

<sup>262</sup>*See* United States v. Babbidge, 40 C.M.R. 39 (C.M.A. 1969).

<sup>263</sup>Mil. R. Evid. 302 analysis; *see also* United States v. Johnson, 47 C.M.R. at 406.

<sup>264</sup>United States v. Shaw, 26 C.M.R. at 50.

<sup>265</sup>*See, e.g.*, United States v. Toledo, 25 M.J. at 275.

<sup>266</sup>*Cf.* AR 600-85, para. 6-3 to 6-5 (ADAPCP communications and records may be protected if the treatment was conducted in accordance with the regulation's guidelines).

rules of evidence recognized in federal criminal trials.<sup>267</sup> A majority of the Military Rules of Evidence were, therefore, subsequently adopted with minor modifications from the Federal Rules of Evidence.<sup>268</sup> One major difference was section V concerning privileges. The federal privilege section was consolidated into a general rule, FRE 501.<sup>269</sup> The military privilege section, however, combined a general rule of privilege with specific rules drawn from the proposed Federal Rules and the 1969 Manual.<sup>270</sup> The only specific privilege rules adopted from the Proposed Federal Rules were generally the noncontroversial ones: the general rule,<sup>271</sup> lawyer-client,<sup>272</sup> communications to clergy,<sup>273</sup> husband-wife,<sup>274</sup> identity of informant,<sup>275</sup> and political vote.<sup>276</sup> Large scale adoption of the Proposed Federal Rules was believed necessary to provide specific guidance and stability to military law.<sup>277</sup> The Military Rules of Evidence parallel the Federal Rules of Evidence, but do not duplicate them.<sup>278</sup> Several factors result in this approach. Contrary to the federal article III court system, the military legal system includes many nonlawyers, uses temporary facilities, and is burdened with worldwide geographical and personnel instability.<sup>279</sup> The drafters' underlying message in this formulation is to keep the privilege rules simple.<sup>280</sup>

## 2. Military Rule of Evidence 501

A federal common law psychotherapist-patient privilege in military courts-martial would have to be based on Military Rule of Evidence 501.<sup>281</sup> Specifically, subparagraph (a)(4) allows the military

<sup>267</sup>Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836(a) (1982) [hereinafter UCMJ] (the UCMJ, as originally passed in 1950, 64 Stat. 107, included 140 articles).

<sup>268</sup>Woodruff, *Privileges Under the Military Rules of Evidence*, 92 Mil. L. Rev. 7 (1981) [hereinafter *Privileges Under the MRE's*].

<sup>269</sup>*Supra* note 98.

<sup>270</sup>Mil. R. Evid. 501 analysis.

<sup>271</sup>Mil. R. Evid. 501.

<sup>272</sup>Mil. R. Evid. 502; Proposed Federal Rule 503, 56 F.R.D. at 235-237.

<sup>273</sup>Mil. R. Evid. 503; Proposed Federal Rule 506, 56 F.R.D. at 247-249.

<sup>274</sup>Mil. R. Evid. 504; Proposed Federal Rule 505, 56 F.R.D. at 244-247.

<sup>275</sup>Mil. R. Evid. 507; Proposed Federal Rule 510, 56 F.R.D. at 255-258.

<sup>276</sup>Mil. R. Evid. 508; Proposed Federal Rule 507, 56 F.R.D. at 249; see *Privileges Under the MRE's*, *supra* note 268, at 7-8.

<sup>277</sup>Mil. R. Evid. 501 analysis.

<sup>278</sup>*United States v. Parker*, 15 M.J. 146 (C.M.A. 1983); *United States v. Wimberley*, 36 C.M.R. at 168.

<sup>279</sup>Mil. R. Evid. 501 analysis; *United States v. Tipton*, 23 M.J. 338 (C.M.A. 1987). See *United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985).

<sup>280</sup>*United States v. Tipton*, 23 M.J. at 343 (Rule 504 was intended to give specific guidance and requires a much simpler inquiry than in a federal criminal trial).

<sup>281</sup>Mil. R. Evid. 501 provides:

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

court to accept a privilege if required by or provided for in the common law principles recognized in federal criminal cases pursuant to FRE 501.<sup>282</sup> This provision, of course, is subject to several limitations. The privilege rule must be logically applicable to the military and not inconsistent with the Uniform Code of Military Justice, the Military Rules of Evidence, or the Manual for Courts-Martial.<sup>283</sup> That could be considered a substantial threshold to overcome, yet the Army Court of Military Review did just that in *United States v. Martel*.<sup>284</sup> In *Martel* the accused was convicted of larceny, housebreaking, and presenting a false dependent travel claim.<sup>285</sup> Evidence at trial included several communications made to the accused's spouse that allegedly came within the husband-wife privilege.<sup>286</sup> The court analyzed the communications under Rule 504, resolving "any deficiencies or ambiguities . . . by interpreting and applying those federal common law principles which seem, in the light of [the court's] reason and experience, most compatible with the unique needs of military due process."<sup>287</sup> In other words, the court used the federal common law gap-filler provision of Rule 501(a)(4) to resolve inconsistencies and deficiencies in another section V privilege rule. The court ultimately

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- (1) The Constitution of the United States as applied to members of the armed forces;
  - (2) An Act of Congress applicable to trials by courts-martial;
  - (3) These rules **or** this Manual; **or**
  - (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, **or** this Manual.
- (b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege **to**:
- (1) Refuse to be a witness;
  - (2) Refuse to disclose any matter;
  - (3) Refuse to produce any object **or** writing; **or**
  - (4) Prevent another from being a witness **or** disclosing any matter **or** producing any object or writing.
- (c) The term "person" includes an appropriate representative of the federal government, a State, **or** political subdivision thereof, or any other entity claiming to be the holder of a privilege.
- (d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer **or** civilian physician in a professional capacity.

<sup>282</sup>*Id.*

<sup>283</sup>*Id.*

<sup>284</sup>19 M.J. 917 (A.C.M.R. 1985).

<sup>285</sup>*Id.*

<sup>286</sup>*Id.* at 924-925; Mil. R. Evid. 504.

<sup>287</sup>*Martel*, 19 M.J. at 925.

adopted a common law presumption of confidentiality on all the private communications made between the accused and his spouse, and imposed a burden on the government to overcome the presumption.<sup>288</sup>

*Martel* conveys two important points. First, the military appellate courts have authority and are willing to change military evidentiary privilege law to reflect federal practice.<sup>289</sup> Second, the law regarding the various privileges was unsettled when the Military Rules of Evidence were adopted.<sup>290</sup> The military rules privilege section was drafted to be flexible to respond to the federal common law of privileges. Thus, authority to adopt a federal common law psychotherapist-patient privilege exists in theory, subject to the limitations mentioned in Rule 501(a)(4).

The most substantial impediment to adopting a psychotherapeutic privilege, however, lies in Rule 501(d).<sup>291</sup> The provision continues the long standing military practice of nonrecognition of the physician-patient privilege.<sup>292</sup> The issue centers on whether adoption of a psychotherapist-patient privilege pursuant to federal common law will be contrary to or inconsistent with Rule 501(d). If the psychotherapist-patient privilege was narrowly applied, then it would not conflict with the doctor-patient privilege language rejected in the rules. This approach, however, would require the courts to recognize the distinctions between psychotherapists and general practitioners. Until that happens, it is extremely doubtful any military court will adopt a federal common law psychotherapist-patient privilege based on Rule 501.

### 3. *Military Rule of Evidence 302*

Rule 302 rectifies few of the problems associated with the absence of a physician-patient privilege in military law. The rule provides that the accused could be compelled to submit to a psychiatric examination, should he raise the insanity defense at trial.<sup>293</sup> Statements made by the accused at the compelled examination are priv-

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<sup>288</sup>*Id.* at 926.

<sup>289</sup>*See also* United States v. Johnson, 3 M.J. 143, 146 n.3 (C.M.A. 1977) (statement against penal interest, though not a principle exception to the military hearsay rule, is an exception under certain circumstances to the Federal Rules of Evidence and, since it is not incompatible with military practice, it is a fully applicable rule of evidence in military courts-martial); *Privileges Under the MRE's*, *supra* note 268, at 7.

<sup>290</sup>*Martel*, 19 M.J. at 925.

<sup>291</sup>*Supra* note 281.

<sup>292</sup>Saltzburg, Evidence, *supra* note 6, at 417.

<sup>293</sup>Mil. R. Evid. 302.

ileged at trial from use against him on the issue of guilt or innocence or during sentencing proceedings.<sup>294</sup> The privilege extends to derivative evidence discovered through use of those compelled statements. "Finally, there is no privilege when the accused introduces those statements or derivative evidence."<sup>296</sup>

Prior to Rule 302's adoption, no such protection existed except by case law.<sup>297</sup> Not only was the accused forced to submit to the mental examination before he could raise the insanity defense, but his statements were discoverable by the government.<sup>298</sup> Those statements are now explicitly kept from the trial counsel until revealed by the defense.<sup>299</sup> The analysis to Rule 302 states that its purpose is to protect the accused's privilege against self-incrimination, rather than create a doctor-patient privilege.<sup>300</sup> The privilege does appear to lessen to some extent the harm to individuals caused by lack of a psychotherapist-patient privilege, but the logic is flawed. Results of compelled mental examinations are admissible only when the accused raises the issue. This is similar to the same exception that every state privilege rule includes.<sup>301</sup> Rule 302 does not protect any statements made by the accused other than at compelled R.C.M. 706 examinations.<sup>302</sup> Rule 302 does not prevent the government from using statements made to civilian or military psychotherapists unless ordered pursuant to R.C.M. 706.<sup>303</sup> Therefore, Rule 302 is not as beneficial as it first appeared in determining the need for a psychotherapist-patient privilege in military courts-martial.

#### 4. Other Military Privilege Rules

Support for a psychotherapist-patient privilege in courts-martial can be found in various other privileges recognized in the Military Rules of Evidence. The attorney-client, priest-penitent, and husband-wife privileges are based upon public recognition that the privacy of those relationships is more important than achieving a short range goal of bringing a criminal to justice.<sup>304</sup>

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<sup>294</sup>*Id.*

<sup>295</sup>*Id.*

<sup>296</sup>*Id.*

<sup>297</sup>United States v. Johnson, 47 C.M.R. 402 (C.M.A. 1973).

<sup>298</sup>MCM, 1969 (Rev. ed.), para. 121; United States v. Babbidge, 40 C.M.R. 39 (C.M.A. 1969).

<sup>299</sup>R.C.M. 706(c)(5).

<sup>300</sup>See Rule 501 analysis.

<sup>301</sup>*Supra* note 229 and accompanying text.

<sup>302</sup>Saltzburg, Evidence, *supra* note 6, at 115.

<sup>303</sup>United States v. Toledo, 25 M.J. at 275.

<sup>304</sup>United States v. Bryant, 16 C.M.R. 747, 752 (A.B.R. 1954) ("The basis for the attorney-client privilege and the requirement of attorney fidelity are rooted deep in

The attorney-client privilege provides the most far reaching protection to an accused. Rule 502 mirrored Proposed Federal Rule 503.<sup>305</sup> Protection under the Military Rules of Evidence was also broadened to include nonlawyer counsel<sup>306</sup> and compelled or inadvertent disclosures.<sup>307</sup> Firmly grounded in the common law, the privilege extends beyond the attorney-client relationship to include others involved in rendering professional legal services.<sup>308</sup>

In some cases the privilege could include psychotherapist-patient communications if the therapist was a "representative" of the attorney, and the privilege was not waived by presenting an insanity defense.<sup>309</sup> This protection would lessen arguments for a psychotherapist-patient privilege, especially since each soldier has access to a military attorney in order to first initiate the attorney-client relationship. Extending the attorney-client privilege to compensate for the lack of a psychotherapist-patient privilege, however, creates a piecemeal and uncertain protection at best. Psychotherapeutic relationships entered into under circumstances unrelated to the mental competency issue at trial, or separate from the attorney-client relationship, continue to have no protection under the military rules.<sup>310</sup>

Two reasons for the attorney-client privilege include encouraging a frank and open relationship and representing a client as his alter ego. A third policy reason in support of the attorney-client privilege is that it reflects the lawyer's ethical duty to preserve his client's confidences.<sup>311</sup> Psychotherapists have similar ethical responsibilities to their patients in their professional codes.<sup>312</sup> Additionally, psychotherapeutic relationships are best able to benefit the patient and society when frank and open discussions are encouraged, much like attorney-client relationships.

Anglo-American law. They parallel similar privileges implicit in relationships such as husband-wife, priest-penitent, . . . and physician-patient where pertinent.").

<sup>305</sup>Mil. R. Evid. 502 analysis.

<sup>306</sup>*Id.*; *Privileges Under the MRE's*, *supra* note 268, at 15.

<sup>307</sup>Mil. R. Evid. 511; *Privileges Under the MRE's*, *supra* note 268, at 18.

<sup>308</sup>Mil. R. Evid. 502; 8 Wigmore, *supra* note 2, § 2290, at 542.

<sup>309</sup>*Toledo*, 25 M.J. at 275-276; Saltzburg, Evidence, *supra* note 6, at 426.

<sup>310</sup>*Toledo*, 25 M.J. at 276.

<sup>311</sup>*Privileges Under the MRE's*, *supra* note 268, at 13.

<sup>312</sup>*See, e.g., The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, § 9, 130 Am. J. Psychiatry, 1058, 1059 (1973) ("The physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of his patients, unless he is required to do so by law . . .") [hereinafter *APA Ethical code*] *Ethical Principles of Psychologists*, 36 Am. Psychologist 633, 635-636 (1981) (Principle 6 describes the primary obligation to maintain confidentiality of patient information, but makes no allowance for legally compelled disclosures.).

Communications to clergy, like psychotherapeutic communications, were not recognized at common law.<sup>313</sup> Like the attorney-client and husband-wife relationships, however, the Military Rules of Evidence recognized that a public advantage "accrues from encouraging free communications" in those relationships.<sup>314</sup> The rule protects only those communications made as a formal act of religion or as a matter of conscience.<sup>315</sup> Here again, the drafters relied heavily on the Proposed Federal Rules.<sup>316</sup> The privilege was also expanded from pre-rules law by preventing disclosure by third party eavesdroppers.<sup>317</sup>

The priest-penitent privilege most closely resembles the intimate and personal relationship present in the psychotherapeutic relationship. Indeed, many clergy and their assistants act as secular quasi-psychotherapists part of the time in counseling soldiers.<sup>318</sup> Yet, those communications may still be privileged if conveyed as a matter of conscience.<sup>319</sup>

The husband-wife privilege of Rule 504, like the attorney-client privilege, has its roots firmly based in the common law.<sup>320</sup> It is in essence a two-part rule, the first concerning the ability of a spouse to testify, and the second dealing with confidential communications in the marriage.<sup>321</sup> Under the current rule, only the witness-spouse has a privilege to refuse to testify.<sup>322</sup>

The frequently cited purpose of the husband-wife privilege was protection of the family relationship.<sup>323</sup> Under prior rules protection of that relationship led to unpopular opinions when crimes against family children occurred. In *United States v. Massey* the court held that the accused's wife was not the victim in the offense of carnal knowledge with her daughter; therefore, she could not testify after the accused invoked the privilege.<sup>324</sup> Subsequently, the rule was modified to allow the spouse's testimony in cases of child abuse.<sup>325</sup>

What is relevant from these facts is that common law rules of evi-

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<sup>313</sup>W. Winthrop, *supra* note 7, at 331-332; *United States v. Moreno*, 20 M.J. 623, 625 (A.C.M.R.1985).

<sup>314</sup>MCM, 1951, para. 151b(2).

<sup>315</sup>Mil. R. Evid. 503(a).

<sup>316</sup>*Id.* at analysis.

<sup>317</sup>Saltzburg, *Evidence*, *supra* note 6, at 434; Mil. R. Evid. 511.

<sup>318</sup>*United States v. Kidd*, 20 C.M.R. 713, 719 (A.B.R. 1955).

<sup>319</sup>Mil. R. Evid. 503.

<sup>320</sup>8 Wigmore, *supra* note 2, § 2333, at 644.

<sup>321</sup>Mil. R. Evid. 504 analysis.

<sup>322</sup>*Id.* See *Trammel v. United States*, 445 U.S. 40 (1980).

<sup>323</sup>*United States v. Trudeau*, 23 C.M.R. 246 (C.M.A. 1957).

<sup>324</sup>35 C.M.R. 246 (C.M.A. 1965).

<sup>325</sup>MCM, 1969 (Rev. ed.), para. 148e; *United States v. Menchaca*, 47 C.M.R. 709 (A.C.M.R. 1973).

dence can and should be changed when they lose their original value. Experience teaches us that intractable rules based on outdated logic inevitably lead to inequitable results. Rules of evidence must remain flexible and responsive to the needs of society. When the scales of justice tip too far in one direction, it is time to reexamine the wisdom of our time honored procedures for developing the truth.<sup>326</sup>

Federal cases analyzing the psychotherapist-patient privilege considered, among several factors, the Proposed Federal Rules of Evidence, their legislative history, and state privilege statutes.<sup>327</sup> Military case law reacted along a similar vein. One military court commented that the Proposed Federal Rules were meant by the Supreme Court for application to federal courts, even though Congress failed to adopt them.<sup>328</sup> In determining whether a couple is separated for purposes of application of the husband-wife privilege under Rule 504, military courts must look to state law.<sup>329</sup> In expanding the breadth of the priest-penitent privilege of Rule 503, the panel in *United States v. Moreno* examined similar state privilege statutes.<sup>330</sup> More recently, in *United States v. Reece*, the Court of Military Appeals held that trial courts must weigh state interest in maintaining confidentiality of juvenile records when determining the relevance and necessity of evidence for cross-examination.<sup>331</sup> These cases demonstrate that factors considered by federal district courts analyzing asserted privileges have similar relevance to military privilege law analysis. Military courts confronted with the psychotherapist-patient privilege should be prepared to consider such factors as the Proposed Federal Rule 504, state privilege statutes, federal cases, federal common law, and distinctions between psychotherapists and general physicians.

### C. PRIVILEGE BY ARMY REGULATION

As discussed earlier, several federal statutes protect the confidentiality of patients and their medical records when the patients are treated for mental illness or drug dependency.<sup>332</sup> It was argued that Congress sought to indirectly change the rules of evidence to protect individuals seeking treatment and rehabilitation.<sup>333</sup> One statute in particular, U.S. Code, title 42, section 290ee-3(a), reflected a congress-

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<sup>326</sup>*Funk v. United States*, 290 U.S. 371 (1933).

<sup>327</sup>*See, e.g., In Re Zuniga*, 714 F.2d at 636-639.

<sup>328</sup>*United States v. Menchaca*, 47 C.M.R. at 713.

<sup>329</sup>*United States v. Tipton*, 23 M.J. 338 (C.M.A. 1987).

<sup>330</sup>20 M.J. 623, 625-626 (A.C.M.R. 1985).

<sup>331</sup>25 M.J. 93, 95 n.6 (1987).

<sup>332</sup>*Supra* notes 207-216 and accompanying text.

<sup>333</sup>*Id.*



sional attempt to combat a national drug problem.<sup>334</sup> Pertinent parts of the statute explicitly required that medical records of patients enrolled in federal drug abuse programs be kept confidential.<sup>335</sup> Congress intended to ensure effective participation and treatment in those programs by removing the threat of subsequent disclosure.<sup>336</sup> The statute did not, however, apply to the armed forces.<sup>337</sup>

Public Law 92-129 required that the armed forces implement its own program to identify and treat drug and alcohol dependent soldiers.<sup>338</sup> The Army's response was Army Regulation (AR) 600-85, the Alcohol and Drug Abuse Prevention and Control Program, (ADAPCP).<sup>339</sup> The regulation's purpose mirrored that of the federal statute to combat drug and alcohol abuse in the Army.<sup>340</sup> The regulation also sought to maintain confidentiality of information concerning soldiers enrolled in the program through its Limited Use Policy.<sup>341</sup>

The policy prevented use of certain information on soldiers in any actions under the Uniform Code of Military Justice, to include courts-martial.<sup>342</sup> The information included evidence obtained through enrollment and participation in the program.<sup>343</sup> It also included evidence relating to emergency medical care, not preceded by an apprehension, of soldiers experiencing a suspected drug or alcohol overdose.<sup>344</sup> The policy, however, had two important exceptions. First, it did not extend to criminal acts committed while under the influence of illegal drugs or alcohol or to illegal use or possession of drugs after entry into the program.<sup>345</sup> Second, there existed no protection if the acts could have an adverse impact on or compromise the mission, national security, or the health and welfare of others.<sup>346</sup> The clear intent of this regulation and its policies was threefold: to protect the privacy and personal confidences of soldiers enrolled in the

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<sup>334</sup>United States v. Howes, 22 M.J. 704, 706 (A.C.M.R.1986); *supra* note 210 and accompanying text.

<sup>335</sup>*Howes*, 22 M.J. at 707.

<sup>336</sup>*Id.*

<sup>337</sup>*Supra* note 210 and accompanying text.

<sup>338</sup>AR 600-85, para. 1-6a.

<sup>339</sup>*Id.*

<sup>340</sup>*Id.*, para. 1-8; *cf.* Army Reg. 40-66, Medical Record and Quality Assurance Administration, para. 2-7 (1 Apr. 1987) (no information on the treatment, identity, prognosis, or diagnosis for alcohol or drug abuse patients will be released except per AR 600-85).

<sup>341</sup>*Id.* para. 6-3.

<sup>342</sup>*Id.* para. 6-4a.

<sup>343</sup>*Id.*

<sup>344</sup>*Id.*

<sup>345</sup>*Id.* para. 6-4b.

<sup>346</sup>*Id.*

program;<sup>347</sup> to remove any fear of public disclosure of past or present abuse; and to encourage participation in a treatment and rehabilitation program.<sup>348</sup>

AR 600-85 created a limited medical privilege in military courts-martial. It is a broad privilege in the sense that limited use evidence, in the possession of any member of the military, cannot be disclosed except in a few specific circumstances.<sup>349</sup> It is a privilege military courts are willing to apply despite its apparent inconsistency with Military Rule of Evidence 501(d). For example, a defense counsel failed to object to introduction of limited use evidence during sentencing in *United States v. Howes*.<sup>350</sup> The appellate court set aside the sentence because of ineffective assistance of counsel.<sup>351</sup> In a footnote the court stressed that Rule 501(d) condemned doctor-patient privileges bottomed on federal common law only.<sup>352</sup> The rule did not prevent soldiers from claiming a privilege provided for by an act of Congress.<sup>353</sup> Although the court did not specifically state that section 290ee-3(a) is "an Act of Congress applicable to trials by court-martial," the inference remains.<sup>354</sup>

AR 600-85 represents one way social pressures to treat illnesses have penetrated the military structure. The Army recognized that, in combatting drug abuse, effective punishment of offenders is not the only solution. The military benefits more if drug abusers can be identified, treated, and rehabilitated. Even those failing rehabilitation still receive some treatment. This approach's success is exceedingly dependent upon the confidentiality provisions of the Limited Use Policy. It serves to point out the inflexibility and outdated nature of the military antimedical privilege position. Psychotherapy, like ADAPCP, serves to treat and rehabilitate soldiers undergoing mental or emotional problems, including drug and alcohol addiction.<sup>355</sup> Common sense tells us that often these problems are interrelated.

<sup>347</sup>*Id.* para. 6-1. *See* *United States v. Howes*, 22 M.J. at 707.

<sup>348</sup>AR 600-85, para. 6-7a.

<sup>349</sup>*Id.* para. 6-9.

<sup>350</sup>22 M.J. 704, 705 (A.C.M.R. 1986) (evidence indicated that the accused had been previously enrolled in ADAPCP, and subsequently rehabilitated for drug abuse); *cf.* *United States v. Bready*, 12 M.J. 963 (A.F.C.M.R. 1982) (narrowly interpreting an Air Force regulation that purported to allow admissibility of statements made by soldiers regarding drug use incident to military medical health care).

<sup>351</sup>*Howes*, 22 M.J. at 706.

<sup>352</sup>*Id.* at 707-708 n.5.

<sup>353</sup>*Id.* Compare AR 600-85, para. 6-9 with 42 U.S.C. § 290ee-3(a) (Supp. IV 1986).

<sup>354</sup>*Id.* at 707-708 n.5.

<sup>355</sup>*See supra* note 101 (definitions of psychotherapist includes a person who engages in the diagnosis and treatment of a mental or emotional condition, including drug addiction).

Mental and emotional illnesses are not high profile problems that attract national attention like drug abuse. Regardless of whether a valid basis for adopting a psychotherapist-patient privilege under Rule 501 exists, a solution to the dilemma would most likely originate in a regulatory provision. For example, an Army regulation could provide that soldiers seeking treatment for mental or emotional conditions desiring confidentiality could enroll in a program similar to ADAPCP. The regulation could allow them to pursue civilian or military mental health care under a quasi-limited use policy. Exceptions to the rule would exist, but its threefold purpose could be met: to protect privacy and personal confidences of soldiers enrolled in the program; to remove any fear of public disclosure of past or present treatment; and to encourage participation in the treatment program.

### ***D. CURRENT TRENDS IN MILITARY LAW***

Apart from one opinion previously addressed,<sup>356</sup> military case law has remained resolute in reaffirming the absence of a doctor-patient privilege in the Military Rules of Evidence.<sup>357</sup> There is also nothing to indicate that the rule will change in the future. While psychotherapy has become a unique and expanding field of medical treatment, military case law has continued to focus on doctor-patient relationships, even when issues involving psychotherapists are involved.<sup>358</sup> Certain related modifications have, however, occurred in the Military Rules of Evidence. They implicitly reflect that nonrecognition of the doctor-patient privilege is too broad a proscription. Privilege rules or equivalent substitutes have been created to resolve the dilemma regarding compelled medical examinations pursuant to R.C.M. 706.<sup>359</sup> What additional piecemeal accommodations will occur remains to be seen.

Three instances were earlier discussed where psychotherapist-patient communications are normally offered into evidence.<sup>360</sup> One involved statements made pursuant to R.C.M. 706 compelled mental examinations. Rule 302 has served to protect to a limited extent the confidentiality of those statements, providing that the accused does not raise the insanity issue.<sup>361</sup> The rule is not meant to be a doctor-patient privilege; nonetheless, it serves the same purpose.<sup>362</sup>

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<sup>356</sup>*Howes*, 22 M.J. at 704.

<sup>357</sup>*Toledo*, 25 M.J. at 275.

<sup>358</sup>*Id.*

<sup>359</sup>*See* Mil. R. Evid. 302.

<sup>360</sup>*Supra* notes 258-266 and accompanying text.

<sup>361</sup>Mil. R. Evid. 302.

<sup>362</sup>*See* Mil. R. Evid. 501(d) analysis.

Another instance concerned psychotherapist-patient communications conducted apart from the mental competency issue, but relevant on some other basis. These communications currently have no protection from disclosure in military courts-martial, once discovered. Individuals who privately sought treatment in the past would be subjected to substantial harm by subsequent disclosure. If a military psychotherapist-patient privilege ever exists, the driving force in its creation will, no doubt, originate because of disclosures in this instance.

In the final instance?an accused who retained the services of his own psychotherapist on the issue of mental competency may subject those communications to forced disclosure, even when sanity is not litigated at trial. The Court of Military Appeals in *United States v. Toledo* recently examined this scenario and offered the closest thing to a psychotherapist-patient privilege yet recognized in military law.<sup>363</sup> In *Toledo* the accused was charged with various specifications of sexually abusing a naval petty officer's daughter.<sup>364</sup> The defense counsel used the services of an Air Force clinical psychologist to determine whether mental competency would be an issue.<sup>365</sup> The counsel never requested that the psychologist be appointed to examine the accused or assist in the defense.<sup>366</sup> The defense counsel also asked the psychologist to keep all information relating to the examination "in strict confidence."<sup>367</sup> Mental competency was never raised at trial.<sup>368</sup> In the government's case-in-rebuttal, the clinical psychologist was called as a witness to testify concerning the accused's character for truth and veracity.<sup>369</sup> The trial judge overruled defense objections based on privilege and allowed the government to present the clinical psychologist's devastating testimony.<sup>370</sup>

The Court of Military Appeals, not surprisingly, ruled that there is no doctor-patient privilege per se under the Military Rules of Evidence.<sup>371</sup> The court did, however, examine another alternative for precluding the psychologist's testimony that was raised at trial but not on appeal: the attorney-client privilege.<sup>372</sup> Upon a proper request the military clinical psychologist could have been assigned to assist

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<sup>363</sup>25 M.J. at 275-276.

<sup>364</sup>*Id.* at 271.

<sup>365</sup>*Id.* at 274.

<sup>366</sup>*Id.*

<sup>367</sup>*Id.*

<sup>368</sup>*Id.* at 270.

<sup>369</sup>*Id.*

<sup>370</sup>*Id.* at 275.

<sup>371</sup>*Id.*

<sup>372</sup>*Id.* See also *United States v. Toledo* 11, 26 M.J. 104, 105 (C.M.A.1988)

the defense team as the defense counsel's representative, thereby falling within the protective umbrella of the attorney-client privilege.<sup>373</sup> Since there was no request, the attorney-client privilege was unavailing.<sup>374</sup> On the other hand, if the defense had hired a civilian clinical psychologist, no request would have been necessary to bring him within the privilege.<sup>375</sup> Of course, any extension of the attorney-client privilege in this case would have been waived if insanity had been raised.<sup>376</sup>

The court seemed to underscore the necessity for a psychotherapist to assist the defense team in dealing with mental competency issues.<sup>377</sup> Trial judges will undoubtedly take a hard look at cases where such requests for assistance are denied. Despite the strategic advantages from not requesting such assistance, the defense in *Toledo* paid a large price for its discretion.<sup>378</sup>

These three instances represent the sum and substance of how the Military Rules of Evidence treat confidential psychotherapeutic communications. The strong anti-medical privilege bias has proven to be a formidable obstacle against recognizing any psychotherapist-patient privilege. Despite its overbroad nature and outmoded rationale, Rule 501(d) remains valid military evidence law. There is room for a narrow psychotherapist-patient privilege, contrary to the literal language of the rule, but there is little chance any change will originate in military case law. Adoption of a psychotherapist-patient privilege is going to require two conditions. First, the perceived need for the privilege will have to be raised, most likely by the civilian and military psychotherapist community. For example, if psychotherapists can demonstrate an impairment of their ability to bring in and effectively treat patients due to lack of confidentiality, the privilege can be better justified. Second, legislative, executive, or regulatory creation of the psychotherapist-patient privilege will have to occur. Military case law is not renown for changing long standing rules of evidence, especially when federal appellate courts are unable to come to a common view on the legal concept.<sup>379</sup> However, adoption of a military psychotherapist-patient privilege rule or creation of a regulation along the lines of AR 600-85, the ADAPCP regulation, will guarantee its application.

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<sup>373</sup>25 M.J. at 275; Mil. R. Evid. 502(a).

<sup>374</sup>*Toledo*, 25 M.J. at 276.

<sup>375</sup>*Id.*

<sup>376</sup>*Id.*

<sup>377</sup>*Id.*

<sup>378</sup>See Williams and Wittman, *United States v. Toledo-A Quasi Psychiatrist-Patient Privilege*, The Army Lawyer, Mar. 1988, at 40.

<sup>379</sup>See, e.g., *In Re Zuniga*, 714 F.2d at 638.

## V. THE PSYCHOTHERAPIST'S PERSPECTIVE—RESULTS OF A SURVEY

One area not yet considered in this article concerns psychotherapist observations. The analysis has so far treated the psychotherapist-patient relationship as an interchangeable concept, affected only by external factors. Inherent in the relation, however, are significant additional elements that can affect the final determination to create a new privilege. Psychotherapists and their patients are influenced by internal factors such as status, ethical and moral obligations, professional responsibilities, behavior modification, and ultimately, personal principles. A modest survey of Army psychiatrists touches on some of these factors and sheds some light on the full range of the dilemma. Before reviewing the survey results, it is necessary to explore the nonfungible nature of the psychotherapist-patient relationship.

### A. PSYCHOTHERAPIST-PATIENT RELATIONSHIPS ARE NOT INTERCHANGEABLE

#### 1. Status

Therapist or patient status can bear on the applicability of a privilege in the military. Nonmilitary patients treated by nonmilitary psychotherapists may legitimately believe that their confidential communications are privileged pursuant to state law.<sup>380</sup> Yet those communications can be disclosed if the patient subsequently becomes an accused,<sup>381</sup> witness, or victim<sup>382</sup> in a military court-martial. Even if state laws mandate a privilege, they can be ignored.<sup>383</sup> Soldiers may also seek the services of nonmilitary psychotherapists to avoid the perceived increased disclosure risks associated with military health care. There may be some actual protection simply because no government official is aware that the soldier received nonmilitary treatment. However, no protection is afforded in the Military Rules of Evidence.<sup>384</sup> In any event, state reporting requirements may ulti-

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<sup>380</sup>See Appendix A, *infra*.

<sup>381</sup>Civilians can be tried in courts-martial if they commit offenses during time of war while serving with or accompanying the armed forces in the field. UCMJ art. 2(a)(10).

<sup>382</sup>See, e.g., *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986) (psychiatric reports on victim should have been disclosed to the defense).

<sup>383</sup>See, e.g., *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987) (state law mandating confidentiality of juvenile alcohol and drug treatment records did not prevent trial judge from ordering disclosure if he so ordered).

<sup>384</sup>See Mil. R. Evid. 501(d).

mately alert government authorities of the communications if they concern specific types of behavior.<sup>385</sup>

Military psychotherapists routinely treat civilian, dependent, and military patients. Legally, there should be no distinctions in the degree to which patients' records are kept confidential. Yet, some therapists see it differently, maintaining stricter confidentiality of their civilian patients' communications.<sup>386</sup> This may be related, in part, to the basic premise of the military in opposing doctor-patient privilege. That is, the privilege is incompatible with the military need to ensure the health and fitness for duty of its personnel.<sup>387</sup> Military psychotherapists perceive less impact on military readiness from civilian dependents' mental or emotional problems than from military patients' conditions.

## 2. Ethical, Legal, and Moral Conflicts

Psychotherapists are subject to various influences in their profession, both professional and personal. Complying with a court order to disclose what they consider confidential information is not always a black and white issue. Psychotherapists will be forced to balance the various factors before deciding how to act. In this vein, it is helpful to consider those concerns.

Most psychotherapists, be they psychiatrists or psychologists, adhere to one of the major ethical codes of their professions.<sup>388</sup> This includes military psychotherapists as well.<sup>389</sup> These codes universally forbid disclosures of confidential information without authority.<sup>390</sup> Legally, however, they provide no privilege in military courts-martial.<sup>391</sup> Psychotherapists' disillusionment of the legal process, however, may cause them to give their ethical obligations more weight, even when the code contains explicit waiver provisions when required by law.<sup>392</sup>

Psychotherapists may also be subject to civil litigation from former patients for breaches of confidentiality, to include suits for monetary

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<sup>385</sup>*Supra* note 231.

<sup>386</sup>*See* Appendix B, question 8, *infra*.

<sup>387</sup>*Mil. R. Evid.* 501 analysis.

<sup>388</sup>*Supra* note 312.

<sup>389</sup>*See* Appendix B, question 12, *infra*.

<sup>390</sup>*See, e.g., supra* note 386 and accompanying text.

<sup>391</sup>*See, e.g., United States v. Wright*, 8 C.M.R. 850, 852 (A.F.B.R. 1953).

<sup>392</sup>*See, e.g., APA Ethical code, supra* note 312.

damages.<sup>393</sup> Bases for liability could include breach of contract, invasion of privacy, breach of fiduciary duty, violation of state privilege laws, or even state licensing requirements.<sup>394</sup> Civilian therapists would be more susceptible to this threat. Military therapists who disclose their civilian patients' confidential communications could experience similar exposure.<sup>395</sup> Civil liability exposure would be substantially decreased, because disclosure would in most cases be pursuant to court orders. At least one state court, however, has held that psychotherapists may be liable for their actions if they voluntarily provide information without first asserting a privilege and then awaiting a court order.<sup>396</sup> Sensitivity to civil liability may cause psychotherapists to resist disclosure at every turn, absent court orders.

Psychotherapists, once compelled to disclose patient information, may fear other adverse actions, such as reports of ethical violations and attempts to suspend or revoke their licenses.<sup>397</sup> These fears would be groundless in light of court ordered disclosures, but they would still increase the anxiety of psychotherapists. No amount of government or court assurance will completely satisfy their concerns.

Psychotherapists faced with ethical, legal, and personal concerns will be confronted with what one commentator referred to as the "cruel trilemma."<sup>398</sup> Under the trilemma, psychotherapists are forced to choose from one of three undesirable results: 1) to violate the extraordinary trust imposed upon them by their patients and their profession; 2) to lie and thereby commit perjury; or 3) to refuse to testify, and thereby be held in contempt of court.<sup>399</sup> The untenable circumstances have led more than one psychotherapist to have memory lapses during testimony, curtail therapy, keep separate or sparse records, and even fabricate evidence.<sup>400</sup>

<sup>393</sup>J. Klein, J. Macbeth & J. Onek, Legal Issues in the Private Practice of Psychiatry 39 (1984) [hereinafter Klein].

<sup>394</sup>*Id.* at 40.

<sup>395</sup>*Feres v. United States*, 340 U.S. 135 (1950).

<sup>396</sup>*Cutter v. Brownridge*, 183 Cal. App. 3d 836, 228 Cal. Rptr. 545 (1986).

<sup>397</sup>Klein, *supra* note 393, at 42.

<sup>398</sup>*The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics*, 58 Wash. L. Rev. 565, 572 (1983) (citing Professor Robert Aronson, Professor of evidence at the University of Washington as the source of the term) [hereinafter *Privilege in Washington*].

<sup>399</sup>*Id.*

<sup>400</sup>*Id.*; see Appendix B, question no. 14 (Survey responses reflected various examples of this conduct).



## ***B. EMPIRICAL DATA CONCERNING ARMY PSYCHIATRISTS***

### *1. Previous Empirical Studies*

No previous surveys have been done with Army psychiatrists addressing privilege. Only one other empirical study to date has directly addressed the psychotherapist-patient privilege.<sup>401</sup> In that study the authors examined certain assumptions in support of and arguments against the privilege.<sup>402</sup> They focused on effects of a Texas psychotherapist-patient privilege statute as perceived by therapists, patients, lay people, and judges one year after its enactment.<sup>403</sup> The authors ultimately returned a mixed verdict; arguments for and against the privilege appeared overstated, because the privilege had actually caused little impact.<sup>404</sup> The Texas statute created a privilege for psychotherapists in civil cases only.<sup>405</sup> Responses would more likely support a privilege against disclosure in a criminal trial where individual liberty is at stake. The study does provide some beneficial information concerning the attitudes of civilian psychotherapists.

Eighty-four civilian psychiatrists, with a median experience of eleven years, were questioned as part of the study.<sup>406</sup> Forty-eight per cent had been requested to disclose confidential communications in court, although only fifteen per cent actually did.<sup>407</sup> The authors never stated whether this resulted in out of court disclosures or what type of information was elicited. One psychiatrist avoided disclosing confidential communications by lying.<sup>408</sup> The authors also revealed that the disclosures resulted in some decreased patient trust, premature termination of the relationship, and one action for malpractice.<sup>409</sup>

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<sup>401</sup>Shuman, *supra* note 35; see also Comment, *Functional Overlap Between The Lawyer and Other Professionals*, 71 Yale L. J. 1226 (1962) (questionnaire study of psychotherapists, psychologists, marriage counselors, lawyers, judges, and lay people concerning privileges) [hereinafter *Functional Overlap*]; Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff* 31 Stan. L. Rev. 164 (1978) (empirical survey of California therapists to ascertain the effects of a State Supreme Court case requiring psychotherapists to warn of patients dangerous to themselves or others) [hereinafter *Public Peril*].

<sup>402</sup>Shuman, *supra* note 35, at 893.

<sup>403</sup>*Id.*

<sup>404</sup>*Id.*

<sup>405</sup>Appendix A, *infra*.

<sup>406</sup>Shuman, *supra* note 35, at 921.

<sup>407</sup>*Id.*; see *Functional Overlap*, *supra* note 401, at 1256 nn. 192 & 196 (only three of thirty-five psychiatrists and six of fifty-one psychologists had been asked in court to disclose confidential information).

<sup>408</sup>Shuman, *supra* note 35, at 935 (Table 3, Appendix, question 5c).

<sup>409</sup>*Id.* at 921.

Seventeen per cent of the psychiatrists routinely discussed confidentiality with their patients.<sup>410</sup> Eighteen per cent did so only when legal problems or a courtroom appearance seemed possible.<sup>411</sup> When patients asked if their comments would remain confidential, forty-seven per cent of the psychiatrists said yes unless the patient was dangerous to himself. Twenty-two per cent said they would unless ordered to disclose by a court, and twelve per cent said confidentiality was absolute.<sup>412</sup> The most interesting response concerned psychiatrists' lack of knowledge in this area. Fifty-five per cent of them were unaware that Texas had a privilege statute.<sup>413</sup>

Based on these responses, the authors concluded that the privilege statute had little impact on the practice of psychotherapy.<sup>414</sup> Ignorance of the statute weighed heavily in that conclusion.<sup>415</sup> The psychiatrists believed only a few patients suffered from the disclosure. This figure is misleading, considering less than half the psychiatrists knew a privilege existed and only seventeen per cent routinely told their patients about it. If the patients' expectations of confidentiality are never raised, they are less likely to be upset when disclosure occurs.

## 2. Army Psychiatrist Survey

As research for this article, 167 questionnaires were sent to essentially every active duty Army psychiatrist. Sixty-five responses were returned, amounting to thirty-nine per cent of those surveyed.<sup>417</sup> This figure was not uncharacteristic for survey responses. The previously discussed Texas study received only forty-five per cent of its therapists' questionnaires back.<sup>418</sup> Ninety-five per cent of the Army psychiatrists responding were licensed to practice psychiatry in at least one state.<sup>419</sup> They averaged twelve years of psychiatric practice and had an average of approximately 2,000 patients during that

<sup>410</sup>*Id.*; see *Public Peril*, *supra* note 401, at 177 n.66 (of 179 psychologists and 1093 Psychiatrists surveyed, 14.5 per cent discussed confidentiality with patients as a general practice, 63.7 per cent discussed it if it came up in therapy, 8.9 per cent discussed it only if asked, and 13 per cent did not respond).

<sup>411</sup>Shuman, *supra* note 35, at 921.

<sup>412</sup>*Id.*

<sup>413</sup>*Id.*

<sup>414</sup>*Id.* at 927.

<sup>415</sup>*Id.*

<sup>416</sup>*Id.* *Contra*, *Public Peril*, *supra* note 401, at 176 n.63 (of 179 psychologist and 1093 psychiatrist surveyed, 79 per cent believed, in their opinion, that patients would feel inhibited if they knew that their communications were not governed by strict confidentiality).

<sup>417</sup>Appendix B, *infra*.

<sup>418</sup>Shuman, *supra* note 35, at 934 (Table 3, Appendix).

<sup>419</sup>Appendix B, *infra*, at question 1.

time.<sup>420</sup> When questioned concerning their knowledge of psychotherapeutic privileges in the states where they were licensed and where they currently practice, the results were surprising. Seventy-six per cent answered incorrectly or did not know what privileges they had in the state in which they were licensed.<sup>421</sup> An even higher number, eighty-four per cent, incorrectly answered or did not know what privilege, if any, they had where they were practicing.<sup>422</sup>

As discussed previously, every state has a statute requiring psychiatrists to report information regarding child abuse.<sup>423</sup> Two-thirds of the responding Army psychiatrists who reside in the continental United States, Hawaii, and Alaska knew that state law in their area required similar reporting.<sup>424</sup> An even higher amount, ninety-one per cent, knew of the Army requirement to report child abuse, separate from any state statute requirement.<sup>425</sup> Given a hypothetical case in which a male patient admitted sexually abusing his daughter, ninety-eight per cent of the respondents indicated they would report the incident to the Army's Family Advocacy Program Officer or the Social Work Service as long as the child was at risk.<sup>426</sup> Only eighty per cent would report the incident if the child were removed from the danger before they were notified the abuse had occurred.<sup>427</sup> Several respondents identified other acts they would report as well if disclosed. Twenty-two per cent would report patients that were dangerous to themselves or others.<sup>428</sup> Only two respondents each indicated they would report elderly or spouse abuse, security risks, treason, homosexual acts, or violations of the UCMJ.

Forty-seven per cent of the respondents protect the confidentiality of communications from nonmilitary patients more than they do military patients.<sup>429</sup> The rest treat them the same.<sup>430</sup> Most of the respondents had testified in one forum or another, seventy-eight per cent in courts-martial, seventy per cent in military administrative proceedings, thirty-nine per cent in state trials, and thirty per cent in

<sup>420</sup>*Id.* at questions 2 & 3.

<sup>421</sup>*Id.* at question 4.

<sup>422</sup>*Id.* at question 5 (only includes the respondents residing in the continental United States, Hawaii, and Alaska).

<sup>423</sup>*Supra* note 231.

<sup>424</sup>Appendix B, *infra*, at question 6.

<sup>425</sup>*Id.* at question 19; *see* Dep't of Defense Directive No. 6400.1, Family Advocacy Program, para. F.1 (10 July 1986).

<sup>426</sup>Appendix B, *infra*, at question 17.

<sup>427</sup>*Id.* at question 18.

<sup>428</sup>*Id.* at question 7.

<sup>429</sup>*Id.* at question 8.

<sup>430</sup>*Id.*

federal trials and state administrative hearings.<sup>431</sup> In all these proceedings, twenty-five per cent of the respondents had been ordered to reveal confidential information at one time or another.<sup>432</sup> Most of the released information concerned the following: patient competency, thirty-three per cent; acts of child abuse, seventeen per cent; other criminal acts, seventeen per cent; truthfulness, eleven per cent; or personal history, eleven per cent.<sup>433</sup>

The greatest disparity in responses occurred when the psychiatrists were asked what, if any, advice they gave their patients concerning confidentiality. Most of the respondents told their patients that only a limited privilege existed, eighteen per cent said that no privilege existed, and three per cent stated that there was an absolute privilege.<sup>434</sup> More specifically, twenty-five per cent told their patients that commanders had access if they had a need to know.<sup>435</sup> Twenty-one per cent said that a court can subpoena information, and twenty per cent gave no advice at all unless an issue arose.<sup>436</sup> Five per cent warned that they must report acts dangerous to patients and others.<sup>437</sup> The best advice was given by about ten per cent of the respondents who had their patients read and sign a preprinted form, explaining the limits of confidentiality, prior to any treatment.<sup>438</sup> It served to ensure accurate, consistent advice was given, memorialized the notice, and removed any lingering doubts about the full extent of confidentiality. Almost every respondent adhered to one or more professional ethical codes, the most popular being the American Psychiatric Association's ethical standards with a following of sixty-seven per cent of the respondents.<sup>439</sup> Contrary to the civilians in the Texas study, most Army psychiatrists knew they had no privilege in a federal court, seventy-seven per cent, or in a court-martial, eighty-five per cent.<sup>440</sup>

By far, the most significant results of the survey concerned what impact the lack of a privilege had on the psychiatrists' abilities to treat patients. Seventy-four per cent said that absence of a privilege in the military had little or no impact.<sup>441</sup> The rest perceived a sig-

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<sup>431</sup>*Id.* at question 9.

<sup>432</sup>*Id.* at question 10.

<sup>433</sup>*Id.*

<sup>434</sup>*Id.* at question 11.

<sup>435</sup>*Id.*

<sup>436</sup>*Id.*

<sup>437</sup>*Id.*

<sup>438</sup>*Id.*

<sup>439</sup>*Id.* at question 12.

<sup>440</sup>*Id.* at question 13.

<sup>441</sup>*Id.* at question 14.

nificant effect,<sup>442</sup> but this may be misleading. The specter of a deeper impact was raised by comments included in their assessment. Two respondents said there was no impact because they warned their patients **beforehand**.<sup>443</sup> Two others claiming no impact asked commanders to not require their testimony whenever **possible**.<sup>444</sup> Several respondents, who indicated little impact, did admit that it limited the extent of their **inquiries**.<sup>445</sup> Many respondents found lack of confidentiality most damaging when discussing homosexuality with patient ~ . ~ ~ ~

Those respondents claiming a significant impact provided the most revealing comments. Some stated that they do not solicit damaging information or that they avoid recording incriminating comments in medical **records**.<sup>447</sup> Still others indicated that lack of a privilege was a very serious drawback to military psychiatry, because it precluded effective **therapy**.<sup>448</sup> Patients, especially officers, reportedly avoided military medical health care because of the lack of **confidentiality**.<sup>449</sup>

Finally, seventy per cent of the responding Army psychiatrists perceived a greater need for confidentiality of communications for psychotherapists than for physicians regarding patient communication ~ Seventy-two per cent favored a privilege in military courts-martial for psychotherapist-patient communications similar to what currently exists for attorneys and **clergy**.<sup>451</sup>

### 3. Results of the Survey

Responses to the questionnaire indicated that there has been a direct impact on one in four Army psychiatrists who were forced to disclose confidential information. This is certainly higher than reported among civilian psychiatrists in the Texas study. It may also reflect that government psychiatrists are more likely to be in a position to testify concerning patients. Army psychiatrists also have other responsibilities in addition to their patients and themselves. As Army officers, they are instilled with the responsibility to help maintain the fitness and welfare of the armed forces. Their duty to the military may supersede the duty to their patient in some cases.

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<sup>442</sup>*Id.*

<sup>443</sup>Survey responses Nos. 28, 40.

<sup>444</sup>Survey responses Nos. 5, 17.

<sup>445</sup>Survey responses Nos. 6, 30, 37.

<sup>446</sup>Survey responses Nos. 40, 44, 57, 61.

<sup>447</sup>Survey responses Nos. 7, 19, 20, 25, 27, 35, 48, 54.

<sup>448</sup>Survey responses Nos. 1, 11, 42, 49, 54.

<sup>449</sup>Survey responses Nos. 18, 21, 41, 42, 46.

<sup>450</sup>Appendix B, *infra*, at question 15.

<sup>451</sup>*Id.* at question 16.

The survey responses raised serious questions about the respondents' knowledge of privilege rules in their state of license or where they practiced. Lack of knowledge regarding privilege or reporting requirements could lead to conflicts with local authorities. The rules are normally very simple and could be made available nationwide with minimal effort. The major disservice from this lack of knowledge concerned warnings made to patients. There appears to be no Army-wide policy on what psychiatrists should include in warnings to their patients. Although most respondents were aware they had no privilege in federal or military trials, few conveyed this knowledge. The responses demonstrated little concern in this area. Patients may unwittingly tell more than they would if properly warned.

What is most evident in the responses is the impact that absence of a privilege has on the psychiatrist-patient relationship. Although most of the respondents indicated that they experienced little or no effect from the situation, their comments by and large controverted that. Many of them adjusted the structure of their relationships to adopt to the situation, such as recording less information, seeking to avoid testimony, or limiting inquiries. Others noticed less use of military medical health care, especially by officers. Unlike the Texas study where fifty-five per cent of the civilian psychiatrists were unaware of the civil privilege, most Army psychiatrists know their privilege status. This knowledge has evidently affected to a noticeable degree their ability to treat soldiers in the military.

## VI. RECOMMENDATIONS

A psychotherapist-patient privilege should be applied to military courts-martial. It could be applied in the form of an Army regulation or a new Military Rule of Evidence.

An Army mental health regulation, similar to the alcohol and drug abuse regulation of AR 600-85, would produce the best solution. It would prescribe a program for identification, treatment, and rehabilitation of military personnel. The proposed regulation would allow only limited use of confidential communications originating in the psychotherapeutic relationship. Those circumstances would include those commonly accepted plus exceptions necessary for the armed forces. For example, the limited use policy could be waived in cases posing a threat to the national security or in instances of suspected child abuse. The proposed Army regulation could grant trial courts discretion in rare instances to abrogate the protection when necessary for the proper administration of justice.

Alternatively, a new Military Rule of Evidence should be

created.<sup>452</sup> It could be adopted in substantial part from the 1972 draft of the Proposed Federal Rule 504.<sup>453</sup> The new rule should not include general physicians under the definition of psychotherapists. Therapy for drug and alcohol addiction would be considered psychotherapy, to reflect the Army's policies inherent in AR 600-85. Exceptions would remain consistent with current rules. For example, a provision excluding statements made pursuant to compelled mental examinations would be duplicitous with Rule 302. Language reflecting the civil law nature of the Proposed Rule 504 would also be deleted. Finally, three new exceptions would be necessary to address modern social issues and the unique nature of the military. These exceptions would include incidents of suspected child abuse, threats to national security, and situations where disclosure is necessary for the proper administration of justice.

The proposed Army regulation or evidence rule would serve two important functions in the military. First, it would fill a void in confidentiality of psychotherapist-patient relations that has lessened the Army's ability to identify, treat, and rehabilitate soldiers suffering from mental or emotional problems. Second, it would codify and simplify a rule of privilege consistent with the approach taken when the other specific military privileges were adopted.<sup>454</sup> In other words, specific guidance as to what communications were or were not privileged would be provided to assist the nonlawyers involved in military justice worldwide.

## VII. CONCLUSIONS

The psychotherapist-patient privilege has become a popular subject of debate in evidence law. Growing acceptance of the profession in society attests to its vitality. It has become one area in which the scales of justice are tipping away from the persistent search for truth, leaning instead toward protecting the privacy and sanctity of a relationship dependent upon trust and confidentiality. The psychotherapist, unlike the general practitioner, contributes to society only so long as society is willing to accommodate him in return. If society will protect the confidentiality of the psychotherapeutic relationship, the psychotherapist can effectively treat and rehabilitate those citizens experiencing mental, emotional, or chemical dependency problems.

Time honored common law concepts pertaining to physicians are overstated and outdated when applied to psychotherapists. The dis-

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<sup>452</sup>Appendix C, *infra*.

<sup>453</sup>*Supra* note 101.

<sup>454</sup>Mil. R. Evid. 501 analysis.

tinctions between the professions merit new analysis. Indeed, many modern commentators agree that the psychotherapist-patient privilege should be recognized.<sup>455</sup>

The psychotherapist-patient privilege is supported by the two major privilege theories in vogue today. The privilege satisfies the fundamental requirements of Dean Wigmore's utilitarian analysis, and it also protects the privacy of confidential communications in a necessarily intimate and personal relationship.

The Supreme Court provided another strong argument for its approval when the Court endorsed the privilege in Proposed Rule 504. This endorsement reflected more than mere approval of a privilege rule. It expressed recognition that the privacy and confidentiality of the psychotherapist-patient relationship had reached a higher level of consequence than the more routine physician-patient relationship.

Federal courts have given a mixed reception to the rule, but the better reasoned opinions, the ones distinguishing psychotherapy from general medicine, have recognized the psychotherapist-patient privilege.<sup>456</sup> They relied to varying degrees on both the utilitarian and privacy privilege theories, Proposed Rule 504, FRE 501, and state law. Federal drug and alcohol abuse and mental health care statutes have also created provisions with an effect similar to the psychotherapeutic privilege. Their thrust is to identify and treat those needing help, not to ferret out information for subsequent disclosure.

State law presented a clear indication of the social approval achieved by the psychotherapeutic privilege. The states have faced the problem, responding with their own privilege rules and exceptions, contrary to the hesitancy that Congress displayed. Only two states currently lack some form of psychotherapeutic privilege.<sup>457</sup>

Where privileges are recognized, they are not absolute. Common exceptions to psychotherapist-patient privileges include hospitalization proceedings, court ordered examinations, cases in which a patient makes his condition an element of his claim or defense, and incidents of suspected child abuse.

The Military Rules of Evidence have demonstrated little desire to accept the privilege, despite favorable receptions in other jurisdictions. Military case law has even failed to seriously consider the dis-

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<sup>455</sup>*Supra* note 91 and accompanying text.

<sup>456</sup>*See, e.g., In re Zuniga*, 714 F.2d at 632.

<sup>457</sup>Appendix A, *infra* (South Carolina and West Virginia).



tinctions between psychotherapists and physicians. Ensuring the health and fitness for duty of personnel is no longer valid justification to not recognize this limited medical privilege. Recent changes in Army policy reflect this adjustment of priorities. R.C.M. 706 has been changed to elevate clinical psychologists to a credibility level equivalent to psychiatrists;<sup>458</sup> and AR 600-85 has ostensibly created a regulatory medical privilege for soldiers undergoing drug and alcohol abuse rehabilitation, despite the explicit language of FRE 501(d).<sup>459</sup>

Current alternatives to the psychotherapist-patient privilege are inadequate. Military Rule of Evidence **302** protects only those statements made during compelled mental examinations.<sup>460</sup> This is waived, as in most state statutes, when the accused raises the mental competency issue.<sup>461</sup>

The military attorney-client privilege of Rule **502**, alluded to in *United States v. Toledo*, provides some relief, but only applies to situations where defense counsel employ psychotherapists.<sup>462</sup> No protection exists for confidential communications made in situations not involving compelled examinations or not shielded by the attorney-client privilege.

Military courts cannot be expected to create a psychotherapist-patient privilege pursuant to the federal common law, notwithstanding these concerns.<sup>463</sup> The Department of the Army or some higher authority must provide regulatory, legislative, or executive relief before any change will occur in military courts.

The Army psychiatrist survey revealed several remarkable facts. Most military psychiatrists know they have no privilege, yet few convey this fact to their patients. This may explain why the psychiatrists perceive no, or only a limited effect upon, their treatment of patients. Beneath the surface, however, evidence indicates that therapy is indeed hindered. Soldiers are not being treated as effectively, if at all, under the current scheme. Military psychiatrists are prevented from treating the mental and emotional problems of our soldiers as effectively as they could. Army psychiatrists are faced with moral, ethical, and legal dilemmas because of the separate interests at stake. Many avoid the problem altogether by taking measures that undermine therapy. Avoiding sensitive issues in therapy, modifying record-keep-

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<sup>458</sup>*Supra* notes 254-257 and accompanying text.

<sup>459</sup>*Supra* notes 339-354 and accompanying text.

<sup>460</sup>Mil. R. Evid. 302.

<sup>461</sup>*Id.*; see *supra* note 229 and accompanying text.

<sup>462</sup>Mil. R. Evid. 502; 25 M.J. at 275.

<sup>463</sup>Mil. R. Evid. 501(a).

ing practices, and scaring away patients add little to the fitness and welfare of our soldiers. Our current evidence rules, however, produce these undesirable results. It is ironic that the military's antimedical privilege position, considered necessary to ensure the health and fitness for duty of its personnel, creates the opposite effect.<sup>464</sup>

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<sup>464</sup>Mil. R. Evid. 501 analysis.

## APPENDIX A

## STATE PRIVILEGE LAW SUMMARY

<i>State</i>	<i>Physician- Patient Privilege</i>	<i>Psychiatrist- Patient Privilege</i>	<i>Psychologist- Patient Privilege</i>	<i>Psychotherapist- Patient Privilege</i>
Alabama		Civ. & Crim. Ala. Code § 34-26-2 (1985)	Civ. & Crim. Ala. Code § 34-26-2 (1985)	
Alaska	Civil only Alaska R. Evid. 504 (1979 & 1988 amend.)			Civ. & Crim. Alaska R. Evid. 504 (1979 & 1988 amend.)
Arizona	Civil only Ariz. Rev. Stat. Ann. § 12-22335 (West 1982)			Civ. & Crim. Ariz. Rev. Stat. Ann. § 32-2085 (West 1986)
Arkansas	Civ. & Crim. Ark. Stat. Ann. § 16- 41-101, Unif. R. Evid. 503 (1987)			Civ. & Crim. Ark. Stat. Ann. § 16-41- 101, Unif. R. Evid. 503 (1987)
California	Civil only Cal. Evid. Code § 994 (West 1966 & Supp. 1988)			Civ. & Crim. Cal. Evid. Code § 1014 (West 1966 & Supp. 1988)
Colorado	Civ. & Crim. Colo. Rev. Stat. § 13- 90-107(d) (1987)		Civ. & Crim. Colo. Rev. Stat. § 13- 90-107(g) (1987)	
Connecticut		Civ. & Crim. Conn. Gen. Stat. Ann. § 52-146(d) (West Supp. 1987)	Civ. & Crim. Conn. Gen. Stat. Ann. § 52-146(c) (West Supp. 1987)	

**NOTE:** State physician definitions included psychiatrists. State psychotherapist definitions varied, but included at a minimum psychiatrists and licensed or certified psychologists.

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Delaware	Civ. & Crim. Del. Unif. R. Evid. 503 (1987)			Civ. & Crim. Del. Unif. R. Evid. 503 (1987)
District of Columbia	Civ. & Crim. D.C. Code Ann. § 14- 307 (1981 & Supp. 1987)		Civ. & Crim D.C. Code Ann. § 6- 2002 (1981)	
Florida				Civ. & Crim. Fla. Stat. Ann. § 90.503 (West 1979)
Georgia	Civ. & Crim. Ga. Code Ann. § 24-9- 40 (1982)		Civ. & Crim. Ga. Code Ann. § 24-9- 21 (1982)	Civ. & Crim. Ga. Code Ann § 43-39-16 (Supp. 1987)
Hawaii	Civ. & Crim. Haw. Rev. Stat. § 626.1; Haw. R. Evid. 504 (1985)		Civ. & Crim. Haw. Rev. Stat. § 626.1; Haw. R. Evid. 504.1 (1985)	
Idaho	Civ. & Crim. Idaho R. Evid. 503 (1987)			Civ. & Crim. Idaho R. Evid. 503 (1987)
Illinois	Civ. & Crim. Ill. Rev. Stat. ch. 110, para. 8-802 (Smith-Hurd 1987)			Civ. & Crim. Ill. Ann. Stat. ch. 111, para. 5306 (Smith- Hurd Supp. 1987)
Indiana	Civ. & Crim. Ind. Code § 34-1-14-5 (1986)			Civ. & Crim. Ind. Code § 25-33-1-17 (Supp. 1987)
Iowa	Civ. & Crim. Iowa Code Ann. § 622.10 (West Supp. 1987)			Civ. & Crim. Iowa Code Ann. § 622.10 (West Supp. 1987)

State	Physician- Patient Privilege	Psychiatrist- Patient Privilege	Psychologist- Patient Privilege	Psychotherapist- Patient Privilege
Kansas	Civ. & Crim. Kan. Stat. Ann. I 60- 427 (1983)		Civ. & Crim. Kan. Stat. Ann. I 74- 5323 (Supp. 1987)	
Kentucky		Civ. & Crim. Ky. Rev. Stat. § 421.215 (Michie/Bobbs- Merrill Supp. 1986)	Civ. & Crim. Ky. Rev. Stat. § 319.111 (Michie/Bobbs- Merrill Supp. 1986)	
Louisiana	Civ. & Crim. La. Rev. Stat. Ann. I 15-476 (West 1981)		Civ. & Crim. La. Rev. Stat. Ann. § 37-2366 (West 1974)	
Maine	Civ. & Crim. Me. R. Evid. 503 (1987)			Civ. & Crim. Me. R. Evid. 503 (1987)
Maryland		Civ. & Crim. Md. Cts. & Judic. Proc. Ann. § 9-109 (1984)	Civ. & Crim. Md. Cts. & Judic. Proc. Ann. § 9-109 (1984)	
Massachusetts				Civ. & Crim. Mass. Gen. Laws Ann. ch. 233, § 20B (West 1986 & Supp. 1987)
Michigan	Civ. & Crim. Mich. Comp. Laws Ann. § 600.2157 (West 1986)	Civ. & Crim. Mich. Comp. Laws Ann. § 330.1750 (West Supp. 1987)	Civ. & Crim. Mich. Comp. Laws Ann. § 330.1750 (West Supp. 1987)	
Minnesota	Civ. & Crim. Minn. Stat. Ann. § 595.02(1)(d) (West Supp. 1988)		Civ. & Crim. Minn. Stat. Ann. § 595.02(1)(g) (West Supp. 1988)	

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Mississippi	Civ. & Crim. Miss. Code Ann. § 13-1- 21 (Supp. 1987); Miss. R. Evid. 503 (1987)		Civ. & Crim. Miss. Code Ann. § 73- 31-29 (1973 & supp. 1987); Miss. R. Evid. 503 (1987)	
Missouri	Civ. & Crim. Mo. Ann. Stat. § 491.060 (Vernon Supp. 1988)		Civ. & Crim. Mo. Ann. Stat. § 337.055 (Vernon Supp. 1988)	
Montana	Civil only Mont. Code Ann. § 26-1- 805 (1987)		Civ. & Crim. Mont. Code Ann. § 26-1- 807 (1987)	
Nebraska	Civ. & Crim. Neb. Rev. Stat. § 27- 504 (1985)		Civ. & Crim. Neb. Rev. Stat. § 27- 504 (1985)	
Nevada	Civ. & Crim. Nev. Rev. Stat. §§ 49.215, 49.225 (1986)		Civ. & Crim. Nev. Rev. Stat. §§ 49.215, 49.225 (1986)	
New Hampshire	Civ. & Crim. N.H. Rev. Stat. Ann. § 329:26 (Supp. 1986); N.H. R. Evid. 503(a) (1987)		Civ. & Crim. N.H. Rev. Stat. Ann. § 330:A.19 (Supp. 1986); N.H. R. Evid. 503(b) (1987)	
New Jersey	Civ. & Crim. N.J. Stat. Ann. § 2A:84A-22.2 (West 1986)		Civ. & Crim. N.J. Stat. Ann. § 45:14B-28 (West Supp. 1987)	

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New Mexico			Civ. & Crim. N.M. Stat. Ann. § 61-9- <b>18</b> (1986); N.M. <b>R.</b> Evid. 504 (1986)	Civ. & Crim. N.M. R. Evid. 504 (1986)
New York	Civil only N.Y. Civ. Prac. Law § 4504 (McKinney Supp. 1988)		Civil only N.Y. Civ. Prac. Law § 4507 (McKinney Supp. 1988)	
North Carolina	Civ. & Crim. N.C. Gen. Stat. § 8-53 (1986)		Civ. & Crim. N.C. Gen. Stat. § 8- 53.3 (Cumm. Supp. 1987)	
North Dakota	Civ. & Crim. N.D. R. Evid. 503 (Supp. 1987)		Civ. & Crim. N.D. R. Evid. 503 (Supp. 1987)	
Ohio	Civ. & Crim. Ohio Rev. Code Ann. § 2317.02(B) (Page Supp. 1987)		Civ. & Crim. Ohio Rev. Code Ann. § 4732.19 (Page 1987)	
Oklahoma	Civ. & Crim. Okla. Stat. Ann. tit. <b>12</b> , § 2503 (West Supp. 1988)			Civ. & Crim. Okla. Stat. Ann. tit. 12, § 2503 (West Supp. 1988)
Oregon	Civ. & Crim. Or. Rev. Stat. § 40.235, Rule 504-1 (1983)			Civ. & Crim. Or. Rev. Stat. § 40.230, Rule 504 (1983)
Pennsylvania	Civil only 42 Pa. Cons. Stat. Ann. § 5929 (Purdon 1982)		Civ. & Crim. 42 Pa. Cons. Stat. Ann. § 5944 (Purdon 1982)	

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Rhode Island	Civ. & Crim. R.I. Gen. Laws § 5- 37.3-4 (1987)		Civ. & Crim. R.I. Gen. Laws § 5- 37.3-4 (1987)	
South Dakota	Civ. & Crim. S.D. Codified Laws Ann. §§ 19-13-6 to -11 (1987)			Civ. & Crim. S.D. Codified Laws Ann. §§ 19-13-6 to -11 (1987)
Tennessee		Civ. & Crim. Tenn. Code Ann. § 24-1- 207 (Supp. 1986)	Civ. & Crim. Tenn. Code Ann. § 63- 11-213 (1986)	
Texas	Civil only Tex. Rev. Civ. Stat. Ann. art 4495b, § 5.08 (Vernon Supp. 1988); Tex. R. Civ. Evid. 509 (1987)			Civil only Tex. Rev. Civ. Stat. Ann. art. 5561h (Vernon Supp. 1988); Tex. R. Civ. Evid. 510 (1987)
Utah	Civil only Utah Code Ann. § 78- 24-8(4) (1987)		Civ. & Crim. Utah Code Ann. § 58- 25-8 (1986)	
Vermont	Civ. & Crim. Vt. Stat. Ann. tit. 12, § 1612 (Supp. 1987)		Civ. & Crim Vt. Stat. Ann. tit. 12, § 1612 (Supp. 1987)	
Virginia	Civil only Va. Code Ann. § 8.01- 399 (1984)		Civil only Va. Code Ann. § 8.01- 399 (1984)	
Washington	Civ. & Crim.* Wash. Rev. Code Ann. § 5.60.060(4) (Supp. 1987)		Civ. & Crim. Wash. Rev. Code Ann. § 18.83.110 (1978)	

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\*Extended to criminal cases by *State v. McKoy*, 70 Wash. 2d 964, 424 P.2d 874 (1967).



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Wisconsin	Civ. & Crim. Wis. Stat. Ann. § 905.04 (West Supp. 1987); Wis. R. Evid. 905.04 (1987)		Civ. & Crim. Wis. Stat. Ann. § 905.04 (West <b>Supp.</b> 1987); Wis. R. Evid. 905.04 (1987)	
Wyoming	Civ. & Crim. Wyo. Stat. § 1-12- 101(a)(i) (1987)		Civ. & Crim. Wyo. Stat. § 33-27-103 (1987)	



C. Elder abuse	2	3%
D. Spouse abuse	2	3%
E. Security risks	2	<b>3%</b>
F. Homosexuality	1	2%
G. Treason	1	<b>2%</b>
H. Planned crimes	1	2%

8. How do respondents treat confidential communications from non-military patients compared to military patients?

(n = 64)	Same—34	<b>53%</b>
	Protect nonmilitary more—30	47%

9. How many respondents have testified in a:

(n = 64)	A. State administrative hearing	19	30%
	B. Military administrative hearing	45	70%
	C. State trial	<b>25</b>	39%
	D. Federal trial	19	30%
	E. Military court-martial	<b>50</b>	78%

10. How many respondents have been ordered to reveal confidential information concerning patients in these proceedings?

(n = 64)	Total—16	25%
(Type of information):		
A. Competency	6	33%
B. Acts of child abuse	3	17%
C. Other criminal acts	3	17%
D. Truthfulness	<b>2</b>	<b>11%</b>
<b>E. Personal history</b>	2	<b>11%</b>
F. Drug use	1	6%
G. Criminal behavior	1	6%

11. What advice do respondents give their patients concerning privilege?

(n = 61)	A. Commander can get access if he has a need to know	15	<b>25%</b>
	B. Court can subpoena	13	21%
	C. No advice until issue arises	12	20%
	D. No privilege exists	<b>11</b>	18%
	E. Limited privilege exists	<b>7</b>	<b>11%</b>
	F. Written notice of limits	6	10%
	G. Art 31b warning		7%
	H. Do only what is in the best interests of the patient	4	<b>7%</b>
	<b>I. Absolute privilege exists</b>	<b>3</b>	<b>5%</b>

J. Must report if patient is a danger to himself or others		3	5%
12. What code of ethics do the respondents follow?			
(n = 55)			
A. American Psychiatric Association ethical standards		37	67%
B. Hippocratic oath		16	29%
C. American Medical Association ethical standards		10	18%
D. Other		5	9%
13. How many respondents know they have no privilege in a federal court or a military court-martial?			
(n = 611)			
Federal court		47	77%
Military court-martial		52	85%
14. What impact does the lack of privilege have on the respondent's ability to effectively treat patients?			
(n = 61)			
None		20	33%
Little		25	41%
Significant		16	26%
15. How many respondents perceive a greater need for confidential- ity of communications between psychotherapist and their patients than physicians and their patients?			
(n = 611)			
Yes		43	70%
No		18	30%
16. How many respondents favor a privilege in military courts- martial for psychotherapist similar to what exists for attorneys and clergy?			
(n = 61)			
Yes		44	72%
No		15	25%
Unsure		2	3%
17. How many respondents would report to authorities if their pa- tient admitted sexually abusing his four-year old daughter and the respondent determined that the child is still at risk?			
(n = 61)			
Would report		60	98%
Unsure		1	2%
(To whom? There may be more than one):			
(n = 46)			
A. Army family advocacy program or Social <b>Work</b> Service		60	98%
B. State authorities		18	39%
C. Patient's commander		6	10%
D. Military police/CID		4	7%

18. Same facts as 17, except now the respondent determines that the child is no longer at risk?

(n = 60)

Would report	48	80%
Would not report	8	<b>13%</b>
Unsure	<b>4</b>	7%

(To whom? There may be more than one):

A. Army family advocacy program or Social Work Service	47	78%
B. State authorities	10	<b>22%</b>

19. How many respondents knew they were required to report such incidents, whether by state law or army policy?

(n = 58)

Yes	<b>53</b>	91%
No	<b>1</b>	<b>2%</b>
Unsure	<b>4</b>	7%

## APPENDIX C

### PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### (a) DEFINITIONS.

(1) A “patient” is a person who consults with or is examined or interviewed by a psychotherapist.

(2) A “psychotherapist” is (A) a person authorized to practice psychiatry in any state or nation or armed service, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug or alcohol addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation or armed service while similarly engaged.

(3) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient’s family.

(b) **GENERAL RULE OF PRIVILEGE.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug or alcohol addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient’s family.

(c) **WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

#### (d) EXCEPTIONS.

(1) *Condition an element of defense.* There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his defense.

(2) *Abused or injured child.* There is no privilege under this rule as

to any communication relevant to an issue concerning the abuse or neglect of a child under the age of 16 years.

(3) *National security interests.* There is no privilege under this rule as to any communication relevant to an issue concerning the national security of the United States Government.

(4) *Proper administration of justice.* There is no privilege under this rule as to any communication relevant to an issue which, in the opinion of the trial court, is essential to the proper administration of justice.





# THE SEAMY SIDE OF THE WORLD WAR I COURT-MARTIAL CONTROVERSY

by Colonel Frederick Bernays Wiener, AUS (Ret.)”

## I. INTRODUCTION

Every student of American military law is fully aware of the dispute over the administration of the court-martial system that followed the close of the shooting phase of World War I. At least two recent treatments have regarded that dispute as essentially a professional disagreement between two concededly outstanding military lawyers, Brigadier General Samuel T. Ansell, Acting Judge Advocate General during most of the war, and his chief, Major General Enoch H. Crowder, the Judge Advocate General (JAG).<sup>1</sup>

Unhappily, this dispute extended beyond purely legal non-concurrence. The comprehensive hearings held before the Senate Committee on Military Affairs in 1919, entitled *Establishment of Military Justice*,<sup>2</sup> demonstrate that the controversy was marred by intense personal antagonism on the part of General Ansell, who not only leveled a series of bitter accusations against his former chief, but similarly assailed almost every individual, regardless of rank, who had disagreed with him in the two years prior to the hearings. That aspect of the underlying controversy has not until now been thoroughly recounted.<sup>3</sup>

Today, seventy years after the event, it is surely appropriate, sim-

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<sup>1</sup>Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 Mil. L. Rev. 1 (1967); *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, c. VII [hereinafter *Army Lawyer History*].

<sup>2</sup>*Establishment of Military Justice: Hearings before the Subcommittee of the Senate Committee on Military Affairs on S.64*, 66th Cong., 1st Sess. (1919) [hereinafter *Hearings*].

<sup>3</sup>D. Lockmiller, Enoch H. Crowder: Soldier, Lawyer, Statesman, c. XIV (1955). Work on the present paper has confirmed and indeed emphasized the view expressed 20 years ago, see F. Wiener, *Civilians Under Military Justice* 229 n.6 (1967), that General Crowder still badly needs an adequate biography.

ply as a matter of history, to take a hard, objective look at what occurred. The narrative that follows is drawn almost exclusively from the printed hearings.

## 11. THE INDIVIDUALS PRIMARILY INVOLVED

Samuel T. Ansell, a North Carolinian, was commissioned in the infantry upon graduation from the U.S. Military Academy in 1899, and received an LL.B. from the University of North Carolina in 1904.<sup>4</sup> He served two tours as an instructor in law at West Point, and then was assigned as Assistant Judge Advocate at Headquarters, Eastern Department, at Governor's Island.<sup>5</sup> At that point, Colonel Enoch H. Crowder, about to be appointed Judge Advocate General, noticed the "very meritorious legal work performed" by then Captain Ansell' and asked whether he would like to come into the Judge Advocate General's Office (JAGO). Ansell replied that "that was his life's ambition." Accordingly, he was assigned to JAGO in 1912; he became a major, judge advocate, in March 1913; and in May 1917 he was promoted to lieutenant colonel.'

With the coming of World War I, Congress authorized temporary promotions in higher grades, then characterized as National Army commissions.<sup>9</sup> Under that authorization, two Regular Army judge advocates became brigadier generals. One was Lieutenant Colonel Walter A. Bethel, sixth in seniority under the JAG, then serving as judge advocate of the Allied Expeditionary Force in France (and who later became TJAG); the other was Lieutenant Colonel Ansell, ninth in seniority.'\* Inasmuch as General Crowder was simultaneously Provost Marshal General (PMG) during the war, which then meant not that he headed the military police, but that he directed the Selective Draft Act,<sup>11</sup> it was Brigadier General Ansell who, from April 1917 until March 1919, except for a three-month absence in 1918 on a trip to Europe, was Acting Judge Advocate General of the Army as the senior officer on duty in the office.'\*

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<sup>4</sup>Army Register 1918, p. 16; I. F. Heitman, *Historical Register and Dictionary of the United States Army* (1903).

<sup>5</sup>*Hearings* at 52.

<sup>6</sup>Promotion to Captain in 1906 (Army Register 1918, p. 16).

<sup>7</sup>*Hearings* at 1209.

<sup>8</sup>*Hearings* at 52; Army Register 1918, p. 16.

<sup>9</sup>Act of May 18, 1917, c.15, § 8, 40 Stat. 76, 81.

\*Army Register 1918, pp. 15-16.

<sup>11</sup>D. Lockmiller, *supra* note 3, cc. XI-XIII.

<sup>12</sup>*Hearings* at 52-53; *Ex.* 155, *Hearings* at 1078, setting forth the precise dates. From April 20, to July 15, 1918, General Ansell was absent on an official trip to Europe. *Hearings* at 747-748; *Ex.* 132-135, *Hearings* at 1035-1037.

A few words about General Crowder need to be inserted here, certainly for a generation that did not know Joseph. He was an 1881 graduate of the U.S. Military Academy, commissioned in the cavalry. A participant in some of the final Indian campaigns, he received an LL.B. from the University of Missouri in 1886 while serving there as a military instructor. In 1895 he became a major, judge advocate, and, while serving in the Philippines, became a general officer, U.S.V., for just ten days in 1901.<sup>13</sup> In 1911 he became JAG, an office he was to hold for 12 years;<sup>14</sup> and in October 1917, he, along with all other heads of staff departments, received a second star.<sup>15</sup>

Justice Frankfurter of the U.S. Supreme Court, who while serving as Law Officer of the War Department's Bureau of Insular Affairs from 1911 to 1914 worked side by side with Crowder, deemed him "one of the best professional brains I've encountered in life."<sup>16</sup> Newton D. Baker, Secretary of War from 1916 to 1921, regarded Crowder as "one of the best lawyers I have ever been in contact with in a life of 25 years at the bar."<sup>17</sup>

Crowder's estimate of his senior assistant was equally high to the end, despite the latter's subsequent personal attacks: "I do not know of a more acute legal mind than Gen. Ansell has."<sup>18</sup>

## 111. THE POWER PLAY

The first step in the ensuing drama was taken by General Ansell, in order that he might place himself in a position where he could become head of JAGO *de jure*, instead of simply being the most senior officer on duty there and as such subject to existing policies and to the approval of JAG.<sup>19</sup>

<sup>13</sup>F. Heitman, *supra* note 4; D. Lockmiller, *supra* note 3, cc. I-X. "U.S.V." is an abbreviation for U.S. Volunteers, a temporary as distinguished from Regular Army rank, in both the Civil War and the Spanish War periods. It was available for both Regulars and non-Regulars.

<sup>14</sup>The Army Almanac 56 (1959).

<sup>15</sup>Act of Oct. 6, 1917, c.105, § 3, 40 Stat. 398, 411.

<sup>16</sup>Felix Frankfurter Reminisces 59 (H. B. Phillips, ed., 1960).

<sup>17</sup>Hearings at 1342.

<sup>18</sup>Hearings at 1210.

<sup>19</sup>During the greater part of the war I was Acting Judge Advocate General, in the sense that I was senior officer on duty in the department. That does not mean that I was responsible for the policies of the office, since a man succeeding by mere virtue of seniority can not be. In order to be responsible for the policies of the office a man must be appointed under section 1132 of the Revised Statutes as acting chief of bureau. . . . I was not in charge of the policies of the office. I made no appointments to office during the war.

On November 3, 1917, General Ansell suggested to General Crowder that, since the latter was normally absent on PMG business, he, Ansell, should be named Acting JAG under the provisions of Revised Statutes section 1132. This section provided: "During the absence of . . . the chief of any military bureau of the War Department, the President is authorized to empower some officer of the department or corps whose chief is absent, to take charge thereof, and to perform the duties of . . . the chief of the department or corps . . . during such absence." General Crowder agreed the next day, subject to having General Ansell "take up directly and in your own way with the Secretary of War the subject matter of your letter of yesterday."<sup>21</sup> General Crowder imposed that condition, because about sixty per cent of the JAG's business with the Secretary of War dealt with civil matters and did not go through the Chief of Staff at all.<sup>22</sup>

Instead, General Ansell never discussed the matter with the Secretary, but dealt directly with the Acting Chief of Staff, Major General John Biddle, sending him a draft War Department General Order under Revised Statutes section 1132, with a covering letter stating that this step had the concurrence of the JAG.<sup>23</sup> Such an order was accordingly issued on November 8th, but was suspended from publication in printed form.<sup>24</sup>

Meanwhile, on October 30th, General Ansell commenced work on a memorandum in which, as Acting Judge Advocate General, he undertook to set aside the conviction of certain enlisted men of Battery A, 16th Field Artillery, "in the exercise of the power of revision conferred upon me by § 1199, R.S."<sup>25</sup> But, notwithstanding the October 30, 1917, date on that paper, it was held in JAGO and was not received by The Adjutant General, its addressee, until the very date, November 8th, that, "By direction of the President," General Ansell was appointed Acting JAG under Revised Statutes section 1132 in War Department General Orders.<sup>26</sup>

Briefly, the fourteen soldiers in question had been placed in arrest by an inexperienced officer, and then ordered the next day to perform duty. They refused because, under existing Army Regulations, no person under arrest could be ordered to perform duty. In view of their

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<sup>20</sup>Ex. 55, *Hearings* at 898-99.

<sup>21</sup>Ex. 56, *Hearings* at 899.

<sup>22</sup>*Hearings* at 1212-13.

<sup>23</sup>Ex. 57, *Hearings* at 899.

<sup>24</sup>*Hearings* at 53, 783; Ex. 58-62, *Hearings* at 899-901.

<sup>25</sup>Ex. 5, *Hearings* at 774-77.

<sup>26</sup>*Hearings* at 731-32, 808.

concerted refusal to obey, which took place in the presence of the entire battery, they were charged with mutiny. In fact, four of the fourteen were acquitted, while sentences for the ten convicted involved executed dishonorable discharges and terms of confinement ranging from three to seven years.<sup>27</sup>

General Ansell followed his October 30th paper on the Texas mutiny case to The Adjutant General with one to the Secretary of War, dated November 10th, setting forth his reasons why section 1199 conferred such a power on him.<sup>28</sup> The views expressed in that later document were indorsed by thirteen other judge advocates,<sup>29</sup> some of whom subsequently withdrew their concurrence.<sup>30</sup> Only three of the thirteen were Regulars; the rest were individuals newly commissioned from civil life.

Section 1199 of the Revised Statutes, drawn from an Act of 1866 but actually reflecting two earlier measures, authorized the JAG of the Army "to receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by" that officer.<sup>31</sup>

General Ansell argued that the JAG's power to set aside convictions under section 1199 was supported by the meaning of the word "revise" in numerous other contexts.<sup>32</sup> And he asserted that his conclusion rested on the legislative history of the provision in question.<sup>33</sup>

#### IV. HALF A CENTURY OF CONTRARY PRACTICE: THE POWER PLAY THWARTED

Later, a few days after receiving that memorandum, the Secretary of War sent for General Crowder, and asked how long he had been

<sup>27</sup>General Court-Martial Order No. 1174, Headquarters, Southern Dep't, Oct. 16, 1917; *Hearings* at 772-73.

<sup>28</sup>Ex. A, *Hearings* at 57-64; Ex. 32, *Hearings* at 839-46.

<sup>29</sup>*Hearings* at 64, 846.

<sup>30</sup>*Hearings* at 730, 807-09; Ex. 33, *Hearings* at 846-47.

<sup>31</sup>Act of July 28, 1866, c.299, § 12, 14 Stat. 332,334. Here are the earlier enactments: 1) Act of July 17, 1862, c.201, § 5, 12 Stat. 597,598: "The President shall appoint . . . a judge advocate general . . . to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings thereon." 2) Act of June 20, 1864, c.145, § 6, 13 Stat. 144, 145: "And the said judge advocate general and his assistant shall receive, revise, and have recorded the proceedings of courts-martial, courts of inquiry, and military commissions of the armies of the United States, and perform such other duties as have heretofore been performed by the judge advocate general of the armies of the United States."

<sup>32</sup>*Hearings* at 58-61, 840-42.

<sup>33</sup>Cong. Globe, 37th Cong., 2d Sess., 3320-21; Cong. Globe, 39th Cong., 1st Sess., 3672-76.

JAG. General Crowder answered, "A little over six years." The next question was, "Why have you not advised me of the existence of an appellate power in the JAG to reverse, modify, or affirm sentences of courts-martial?" General Crowder replied that there had never been any such view on the part of any JAG.<sup>34</sup> Until then, General Crowder had not known of General Ansell's memorandum.<sup>35</sup>

In due course, General Crowder submitted a counter-memorandum, which destroyed every aspect of General Ansell's presentation.<sup>36</sup> 1) The rulings as to the meaning of "revise" in other enactments had no application whatever to the proceedings of courts-martial. 2) There is nothing in the legislative history of the statute that is worthy of remark. 3) The administrative history of the departmental practice over a period of fifty-five years is plainly to the contrary. 4) The single relevant ruling from the civil courts supported that practice, a decision of the U.S. Circuit Court for the Northern District of New York, then unreported, but "found pasted in our office file of the Federal Reporter."<sup>37</sup> General Ansell admitted knowing of that decision since 1902, "which for the moment and perhaps of its utter lack of authority I had forgot."<sup>38</sup> It was ultimately reported in 1919.<sup>39</sup>

With those conflicting views before him, Mr. Baker, an active practitioner prior to his 1916 appointment as Secretary of War, "examined the whole question then individually, personally going to the library of the Judge Advocate General's Office for my authorities, and decided the question"<sup>40</sup> as follows: "The extraction of new and large grants of power by reinterpreting familiar statutes with settled practical construction is unwise. A frank appeal to the legislature is wiser."<sup>41</sup> A longer memorandum to the same effect, after General Ansell had submitted a further brief,<sup>42</sup> was no different: "It is impossible not to admire the earnestness and eloquence with which Gen. Ansell presents his view. For the most part, however, the argu-

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<sup>34</sup>*Hearings* at 1342-43, 1203.

<sup>35</sup>*Hearings* at 1203.

<sup>36</sup>*Ex. B, Hearings* at 64-71; *Ex. 34, Hearings* at 847-54.

<sup>37</sup>*Hearings* at 1214-15.

<sup>38</sup>*Ex. 38, Hearings* at 865, 873.

<sup>39</sup>*Ex parte* Mason, 256 Fed. 384 (C.C.N.D.N.Y. 1882). This decision is erroneously attributed to "the Circuit Court of Appeals for the Northern District of New York" in Brown, *supra* note 1, at 5, an error repeated in Army Lawyer History, *supra* note 1, at 129. There were of course no Circuit Courts of Appeals prior to the Act of March 3, 1891, c.517, 26 Stat. 826.

<sup>40</sup>*Hearings* at 1343.

<sup>41</sup>*Hearings* at 71, 117.

<sup>42</sup>*Ex. C., Hearings* at 71-85; *Ex. 36, Hearings* at 863-64; *Ex. 38, Hearings* at 865-79.

ment runs to the necessity of the power rather than to its existence.”<sup>43</sup>

At about this time, on November 17th, Secretary Baker asked General Crowder to devote more of his time to JAGO, “where I have learned so confidently to rely on you.”<sup>44</sup> The next day, General Crowder replied that he thought he could divide his time equally between PMGO and JAGO.<sup>45</sup> Upon receipt of that reply, on November 19th, the Secretary of War cancelled the order making General Ansell Acting JAG under Revised Statutes section 1132.<sup>46</sup>

## V. WAR DEPARTMENT MOVES IN THE DIRECTION OF MILITARY APPELLATE REVIEW

A little later, the War Department presented to Congress a proposed amendment to Revised Statutes section 1199, conferring upon the President direct appellate power to set aside court-martial proceedings.<sup>47</sup> No action was ever taken on that request, which General Ansell did not favor, and which, he later asserted, had not been prepared in good faith.<sup>48</sup>

Meanwhile General Crowder, who agreed with General Ansell that the record in the trial of the Texas “mutineers” was legally insufficient to sustain a conviction for mutiny, took steps to restore those soldiers to duty from their confinement in the Disciplinary Barracks. They were accordingly restored to duty on January 5, 1918, without any loss of pay.<sup>49</sup> The Inspector General, Major General John L. Chamberlain, had proposed this same course as an exercise of clemency.<sup>50</sup>

At about this same time, General Orders 169 of December 29, 1917, had directed that no death sentences be executed in the United States until after review by JAG,“ and General Orders 7 of January 7, 1918, established boards of review in that office that would similarly review not only death sentences but also those involving dismissals and dishonorable discharges.<sup>52</sup> In addition, in order to expedite the

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<sup>43</sup>Ex. G, *Hearings* at 90-91; Ex. 52, *Hearings* at 893-94.

<sup>44</sup>Ex. 64, *Hearings* at 901; *Hearings* at 1213-14.

<sup>45</sup>Ex. 65, *Hearings* at 902; *Hearings* at 1214.

<sup>46</sup>Ex. 63, *Hearings* at 901; *Hearings* at 1214.

<sup>47</sup>Ex. 41, *Hearings* at 881-84; Ex. 48-51, *Hearings* at 888-93.

<sup>48</sup>*Hearings* at 110-13, 115, 826, 1226-27, 1235.

<sup>49</sup>*Hearings* at 779-82, 1224-28.

<sup>50</sup>*Hearings* at 728; Ex. 6, *Hearings* at 778.

<sup>51</sup>Ex. 53, *Hearings* at 894-95.

<sup>52</sup>Ex. 54, *Hearings* at 897-98.

review of similar cases arising in the Allied Expeditionary Force in France, a branch office of JAGO was established there.<sup>53</sup> The officer appointed to head that new installation was Lieutenant Colonel Edward A. Kreger, one file senior to General Ansell on the permanent JAGO roster, who was promoted to brigadier general for his new assignment.<sup>54</sup> (In due course he too became TJAG.)

The record plainly shows that, despite the circumstance that General Orders 7, which was rested on the President's power under Article of War 38 to prescribe rules of procedure for courts-martial, provided substantially the same appellate relief that General Ansell had inferred from section 1199 of the Revised Statutes, in fact he constantly criticized all proceedings under General Orders 7.<sup>55</sup> And, as one of his subordinates later testified,

whenever an officer went to Gen. Ansell to discuss any proposed action in a court-martial case the discussion was almost certain, before it was finished, to resolve itself into an argument on his part in support of his construction of the word "revise", so that that was intruded in almost every legal discussion.<sup>56</sup>

As General Crowder put it after General Ansell had publicly attacked him, "his attitude seems to have been that of a man who would put out a fire with his own hose or would otherwise let the building burn."<sup>57</sup>

From April to July 1918, General Ansell was sent abroad to study the operation of the war laws of America's allies.<sup>58</sup> In his report, General Ansell said:

I have been surprisingly struck with the prevision with which the office of the Judge Advocate General of our Army has been administered for the past several years, including the period of this war. Without particular opportunities for so doing, and without the advantage of actual war experiences had here, it has anticipated necessities of administration which as a rule only experience develops; and, more re-

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<sup>53</sup>Ex. 73-90, *Hearings* at 959-77; General Orders No. 84, War Dep't, Sept. 11, 1918 (Ex. 91, *Hearings* at 978), as amended by General Orders No. 41, War Dep't, March 25, 1919 (Ex. 106, *Hearings* at 994).

<sup>54</sup>Army Register 1918, p. 15.

<sup>55</sup>Ex. 42, *Hearings* at 884-85; Ex. 137, *Hearings* at 1042-44; see generally testimony of Colonel E.G. Davis, Ex. 20, *Hearings* at 807-19.

<sup>56</sup>*Hearings* at 829.

<sup>57</sup>*Hearings* at 1218.

<sup>58</sup>*Hearings* at 747-48; Ex. 133-35, *Hearings* at 1035-37.



markable still, there is a surprising consonance between the principles of administration which our office had recommended to be adopted and which doubtless in the end will be adopted in the department and those principles which are found to be an approved basic part of the military administration of the allied nations.<sup>59</sup>

## VI. STRANGE REACTION TO PUBLIC COMMENDATION

On January 2, 1919, General Crowder recommended General Ansell for an award of the Distinguished Service Medal, "For especially meritorious and conspicuous service as Acting Judge Advocate General of the Army, whose broad and constructive interpretations of laws and regulations have greatly facilitated the conduct of the war and military administration." That decoration was accordingly conferred.<sup>60</sup>

But, shortly afterwards, General Ansell commenced a personal attack on General Crowder and on the wartime operation of the entire military justice system, beginning with a letter to Congressman Burnett, which was published on February 19th.<sup>61</sup> Other members of the Congress, notably Senator Chamberlain of the Military Affairs Committee, made similar attacks on the wartime court-martial system, with detailed instances that had obviously been supplied by General Ansell.<sup>62</sup> Yet, as General Crowder later testified—under oath—"I had no adequate warning from him of the conditions which he has sensationalized before the country."<sup>63</sup>

All of this, as General Crowder further said, "created an impossible situation."<sup>64</sup> Accordingly, on March 10th, Ansell was demoted to his permanent rank of lieutenant colonel,<sup>65</sup> and was relieved of all duties relating to military justice except as to clemency matters.<sup>66</sup> A few months later, on July 21st, Lieutenant Colonel Ansell resigned from the Army.<sup>67</sup>

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<sup>59</sup>*Hearings* at 767.

<sup>60</sup>Ex. 153, *Hearings* at 1070-71; General Orders No. 18, War Dep't, Jan. 27, 1919; *Hearings* at 1282.

<sup>61</sup>Ex. 29, *Hearings* at 906-10; Ex. 164, *Hearings* at 1118-21.

<sup>62</sup>Ex. 162, *Hearings* at 1091-96.

<sup>63</sup>*Hearings* at 1221. For General Crowder being sworn at his own request prior to testifying, see *Hearings* at 1134.

<sup>64</sup>*Hearings* at 1282.

<sup>65</sup>Ex. 155, *Hearings* at 1073, ¶ 5.

<sup>66</sup>D. Lockmiller, *supra* note 3, at 205.

<sup>67</sup>*Hearings* at 52.

## VII. THE INSPECTOR GENERAL'S INVESTIGATION

Earlier, Secretary Baker had directed Major General Chamberlain, The Inspector General (TIG), to investigate the controversies with regard to the administration of military justice during the war that had commenced with the difference of opinion regarding the construction of section 1199—but not to inquire into the legal question involved in that difference, which the Secretary had definitively settled.<sup>68</sup> Two months later, on May 8th, General Chamberlain submitted a comprehensive report, which, including exhibits and verbatim testimony of no less than twenty-one witnesses, extends to nearly 400 printed pages in small type.<sup>69</sup> But TIG got no help from Lieutenant Colonel Ansell; he declined to testify ('inasmuch as I believe the purpose of [this investigation] is to lay a foundation for disciplinary action against me.'<sup>70</sup>

Hearings on Senator Chamberlain's bill, S.64, "A Bill to establish military justice," which Mr. Ansell had drafted,<sup>71</sup> began on August 2, 1919. The first witness on the bill, a retired Regular officer, denounced the court-martial system then in effect in rounded terms. Before long, however, he undercut that measure's proposed Articles of War 5 and 6, which proposed that privates should try privates and noncommissioned officers try noncommissioned officers. Said Major J.E. Runcie, "I would not expect to find judicial characteristics of a high order among enlisted men."<sup>72</sup>

He was followed by Mr. Ansell, whose testimony inclusive of exhibits fills 244 pages.<sup>73</sup> His remarks reflected substantial inaccuracies.

General Chamberlain's report to the Secretary of War was notably even-handed. Thus, he determined that responsibility for the issuance of the order appointing General Ansell Acting JAG under section 1132 "without reference to the Secretary of War and without his knowledge, rests with the then Acting Chief of Staff, and not with Gen. Ansell."<sup>74</sup> With respect to the differences between General Orders 7 and General Orders 84, the latter of which established the

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<sup>68</sup>Ex. 1, *Hearings* at 770-71.

<sup>69</sup>*Hearings* at 726-1121. The witnesses are listed at *id.* 728-29

<sup>70</sup>*Hearings* at 727; Ex. 27, *Hearings* at 833.

<sup>71</sup>*Hearings* at 102.

<sup>72</sup>*Hearings* at 42.

<sup>73</sup>*Hearings* at 51-294.

<sup>74</sup>*Hearings* at 732.

branch office in France, he determined that, because the latter “was issued without its provisions being fully understood and concurred in by the Chief of Staff and the Secretary of War, responsibility rests not with Gen. Ansell but with the office of the Chief of Staff.”<sup>75</sup> But TIG enumerated three separate instances where General Ansell’s statements had been demonstrably erroneous.

1) “[General Ansell’s] statement, repeatedly made, that General Orders No. 7, adopted to carry out the very views which he himself first advocated, were ‘an administrative palliative’ is not in accord with the facts and is another instance where the public has been misled.”<sup>76</sup>

2) “From the records and from all available evidence, it appears that Gen. Ansell’s statement that, from November, 1917, to April, 1918, he had nothing to do with the administration of military justice and that the proceedings did not come over his desk, is not in accord with the facts. On the contrary, it appears that his initiative and authority as senior assistant remained undisturbed and that he was in no degree hampered in any changes which, within the law, he desired to make.”<sup>77</sup>

3) The facts, “stripped of all elements of uncertainty, lead to the conclusion that Gen. Ansell’s statements, as to his attitude and activities in connection with the [four death cases from France that required Presidential confirmation] are misleading and widely variant from the facts.”<sup>78</sup> Secretary Baker’s subsequent testimony reflected agreement with TIG: “Gen. Ansell’s statement that it was necessary for him to bestir himself to prevent execution of those sentences has no basis whatever in fact. He may have bestirred himself, but my action was without the least knowledge of any opinion or action of his.”<sup>79</sup>

<sup>75</sup>*Hearings* at 740.

<sup>76</sup>*Hearings* at 737.

<sup>77</sup>*Hearings* at 743.

<sup>78</sup>*Hearings* at 747. Two soldiers had been convicted in France of sleeping on post while posted as sentinels, and two others of disobeying the orders of their superior officer. All four were sentenced to death, but under Article of War 48(d) of 1916 death sentences for those offenses could not be confirmed by any authority lower than the President. For summaries, see TIG’s report at *Hearings*, 743-47, and Ex. 110-132 at *id.* 1006-35. Secretary Baker’s memorandum to the President recommending clemency and the President’s action adopting that recommendation are at Ex. 125-130, *Hearings*, 1030-35, and are repeated at *id.* 1351-55. General Pershing had recommended that all four sentences be executed, Ex. 114, *Hearings* at 1010, but he does not mention those cases in his memoirs. See J. Pershing, *Experiences in the World War* (1931).

<sup>79</sup>*Hearings* at 1355.

## VIII. ANOTHER AND POSSIBLY INNOCENT MISSTATEMENT

The record discloses a further misstatement by then Mr. Ansell, which may indeed have been an innocent one. This requires some background to place it in context.

In August 1917 numerous members of the 24th Infantry, one of the four Regular Army regiments that were required by law to be composed of "colored men,"<sup>80</sup> rioted on the streets of Houston, Texas. No less than fifteen civilians were killed in the disorder that ensued. On November 1st, a general court-martial was convened by the Commanding General, Southern Department, to try sixty-three of those soldiers, who were charged with mutiny and murder."

At the conclusion of the trial early in December, five of the accused were acquitted. Four were sentenced to short terms, forty-one to life imprisonment, and thirteen sentenced to be hanged. Those thirteen were hanged the next morning, the first mass execution under American military law since the recaptured San Patricio deserters were executed during the Mexican War.<sup>82</sup>

Until the news of the multiple hangings at Houston reached the Washington papers, no one in the War Department had even known of the trial. One contemporary on duty there later testified that this news "came as something of a shock to the War Department,"<sup>83</sup> another that it landed there "with a dull thud."<sup>84</sup>

But what had been done was entirely legal under the newly enacted 1916 Articles of War. A department commander in time of war was authorized to confirm death sentences in cases of murder and mutiny. Where, as in the Houston case, the confirming authority had himself convened the court-martial, no action additional to his original approval was required, and the law imposed no prior legal review by any staff officer, much less any reference to the War Department.<sup>85</sup>

The daily record of that trial had been reviewed on a day-to-day basis by the department commander's judge advocate. He had found

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<sup>80</sup>R.S. §§ 1104, 1108.

<sup>81</sup>Army Lawyer History, *supra* note 1, at 125-27.

<sup>82</sup>*Id.*; C. Elliott, Winfield Scott: The Soldier and the Man 517, 546 n. 27, 555-56 (1937).

<sup>83</sup>Hearings at 809.

<sup>84</sup>This quotation is from the late Colonel William Catron Rigby, JAGD.

<sup>85</sup>Article of War 48 of 1916; Manual for Courts-Martial, 1917, ch. XVI.

it legally sufficient as to the thirteen sentenced to hang.<sup>86</sup> And later, when the record ultimately reached JAGO, it was there, on January 29, 1918, also found legally sufficient.<sup>87</sup>

But it was the Houston case that produced General Orders No. 167, dated December 29, 1917, which prohibited the execution of any death sentences in the United States until after review in JAGO.<sup>88</sup> The Houston case also produced General Orders No. 7, on January 17, 1918, establishing the appellate system of examination by boards of review prior to the execution of any court-martial sentence extending to death, dismissal, or dishonorable discharge.<sup>89</sup>

With this background filled in, we turn to Mr. Ansell's Senate Committee testimony of August 26, 1919. He there presented a memorandum he had previously sent General Crowder, on the very day that the Houston executions were reported in the *Washington Post*, entitled "Evidence of inefficiency of Maj. Gen. John W. Ruckman, commanding the Southern Department . . . and of Col. George M. Dunn, JAGD, the judge advocate upon the staff of Gen. Ruckman." This communication said, in pertinent part:

3. Yesterday we were apprised, through the public press and for the first time, that Gen. Ruckman had proceeded summarily to execute the sentences of death in the case of 13 negro soldiers recently tried in his department. . . . Under the circumstances of this case the action taken by this commander was such a gross abuse of power as justly to merit the forfeiture of his commission.

4. I must assume that this general officer has sought and acted upon the advice of his judge advocate, Col. Dunn, and that this officer therefore has, in the same degree with General Ruckman, manifested his incompetence at a critical time."

Brigadier General Ansell, as he then was, requested General Crowder to bring those views to the attention of the Chief of Staff and of the Secretary of War, but later told the Senate Committee that nothing was done in consequence of that communication.<sup>91</sup>

Here the answer is, first, that there was no reason whatever to proceed against Colonel Dunn. That officer's conclusion, based upon ex-

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<sup>86</sup>*Hearings* at 1125.

<sup>87</sup>*Hearings* at 1125-26.

<sup>88</sup>*Note 51, supra.*

<sup>89</sup>*Note 52, supra.*

<sup>90</sup>*Hearings* at 130-31.

<sup>91</sup>*Hearings* at 131.

isting law and upon current daily review of a record of trial that finally included nearly 2,200 pages of testimony, was later approved by Colonel James J. Mayes, then Acting JAG, with the comment that the record had been "singularly free from evidence that is irrelevant or of doubtful competency."<sup>92</sup> Nor had there been any rush to judgment; following the conclusion of the testimony, the court had spent several days considering its findings and sentences.<sup>93</sup>

As to General Ruckman, action was indeed taken, quite contrary to Ansell's testimony. He was discharged from his National Army commission as major general, reduced to his permanent rank of brigadier general, and relieved from command of the Southern Department.<sup>94</sup>

Both steps took place in May 1918. Because that month fell in the interval that General Ansell was in Europe, April 20th to July 15th,<sup>95</sup> it is accordingly entirely possible that he was never contemporaneously advised of the action that the War Department took in consequence of General Ruckman's obvious utter lack of judgment.

The result is that Ansell's statement that no action was ever taken on his December 1917 recommendation with respect to General Ruckman may well have involved a wholly innocent mistake.

## IX. THE 1919 SENATE HEARINGS

No such excuse can be ventured with respect to the rest of Ansell's 1919 presentation. Not only was it inaccurate, it was marked by vituperative comments directed at virtually every individual who had disagreed with him at any time from 1917 to 1919, or who had exposed his own economy in the use of truth. Thus, according to his Senate testimony, "the weakest grade in the Army of the United States is the grade of general officers. . . . [M]any of our generals are jokes to everybody else in the world except ourselves and themselves."<sup>96</sup> The Inspector General was assailed as "thoroughly reactionary,"<sup>97</sup> and as one "whose views savor of professional absolutism."<sup>98</sup> Secretary Baker was similarly targeted as "thoroughly reactionary."<sup>99</sup> Indeed, Ansell even attacked one of the latter's predeces-

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<sup>92</sup>*Hearings* at 1125-26.

<sup>93</sup>*Hearings* at 1125.

<sup>94</sup>*Order of Battle of the United States Land Forces in the World War (1917-1919): Zone of the Interior 602 (1949); Army Register 1918*, p. 8.

<sup>95</sup>Note 12, *supra*.

<sup>96</sup>*Hearings* at 121.

<sup>97</sup>*Hearings* at 116, 173.

<sup>98</sup>*Hearings* at 123.

<sup>99</sup>*Hearings* at 110.

sors as Secretary of War, ex-President William Howard Taft, for allegedly perverting "his power to the furtherance of a plan . . . to maintain the existing vicious system of military justice and to do me great personal injury."<sup>100</sup> And there was much more, all of it available in the printed hearings for anyone interested in variations on the ex-general's theme of defamation and calumny. As Secretary Baker summed up the matter, Ansell "not only disagreed with his superiors, he slandered all his superiors."<sup>101</sup>

There were indeed provisions that looked to the future in the military justice bill that Ansell drafted for Senator Chamberlain. But it is impossible to examine the nearly 1,400 pages of the hearings on that measure—and the present writer has read every word in that volume on four different occasions over the years—without concluding that Samuel T. Ansell was engaged in a virulent and vindictive vendetta against the particular individual who was first his sponsor, and who then became the principal benefactor of his military career. It was to General Crowder that Ansell owed his status as a judge advocate, his promotion to general officer rank, and his Distinguished Service Medal for wartime service—the lapel insignia of which always graced his attire in later years.<sup>102</sup>

When General Crowder appeared before the Senate Subcommittee, he was asked this question by its Chairman, Senator Francis E. Warren of Wyoming: "In your examination of the case, or of this evidence, and your alluding to your relations to Gen. Ansell, is it with any feeling of enmity between you, or is it a review of legal points, apart from any feeling?"<sup>103</sup> Here was General Crowder's reply:

I want to say right now that I do not know of a more acute legal mind than Gen. Ansell has. He is a very able man, and has rendered the department, and me, conspicuous service. Our relations for the next four years [after March 1912] were as intimate as relations well could be between officers who worked in daily contact with each other and what those relations were is evidenced by some letters I received from him. Those I think are the most convincing answer that could be made to your question.

Ordinarily I would hesitate to utilize these letters which, though not marked personal, breathe a personal relation, and a man ordinarily keeps such on his private files. Howev-

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<sup>100</sup>"*Hearings* at 1269.

<sup>101</sup>"*Hearings* at 1366. Evidence supporting Secretary Baker's conclusion can be found at *Hearings* at 1268-73, 1281-1314, 1323-38.

<sup>102</sup>"Author's personal observation in 1948-1949.

<sup>103</sup>*Hearings* at 1209.

er, these letters do establish a fact responsive to your inquiry, viz, that the most cordial, intimate personal and official relations existed between Gen. Ansell and myself, after four years of daily contact, and that these four years of our relations can be dismissed from your mind as furnishing any incident whatever out of which the vindictive hostility he has recently expressed toward me could have grown, and by necessary inference negative many of the personal allegations against me that he has recently made.<sup>104</sup>

Why then did Ansell turn so viciously against the single person to whom he was most indebted for his professional advancement over the years?

## X. A PROVISIONAL EXPLANATION

The key to solution of the enigma just posed is to be found in the chronological coincidence of Ansell's actions under two separate sections of the Revised Statutes. On October 30, 1917, he signed a memorandum purporting to set aside the sentences that a court-martial had adjudged in the Texas mutiny case; and he did this under the asserted power of the JAG under section 1199. As an Army officer of eighteen years' commissioned service, and as one on duty in JAGO for five years, he surely knew that no such power had ever been exercised. Indeed, he had known for fifteen years of the only judicial decision on the matter and that had denied the existence of any such power. At any rate, he postponed transmission of the October 30th paper until, with General Crowder away managing the Selective Draft, he could himself direct—and change—all existing policies without reference to his absent superior. Accordingly, on November 3rd, he set in motion his request for designation as Acting JAG under section 1132.

General Crowder agreed, subject to General Ansell's discussing the matter directly with the Secretary of War—the one step General Ansell failed to take. So, on November 8th, the desired order was issued—and it was not until that precise day that the paper purporting to set aside the conviction of the Texas "mutineers" reached The Adjutant General. General Ansell's more lengthy memorandum arguing that section 1199 conferred such power bears the date of November 10th.

On its face, that longer paper bore the concurrence of thirteen other officers, all but three of them newly commissioned, and who in con-

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<sup>104</sup>*Hearings* at 1210.



sequence could not have known independently that the unbroken practice of fifty-five years was directly contrary to General Ansell's conclusion. Without doubt, the most outstanding of the baker's dozen in agreement with General Ansell was Major (ultimately Colonel) Eugene Wambaugh, on leave from teaching constitutional law at the Harvard Law School. But his separate memorandum in respect of the broader interpretation of section 1199 reflects no familiarity with the long practice thereunder, and after careful scrutiny quite fails to convince.<sup>105</sup>

Significantly, although General Ansell had solicited the assent and signatures of ten officers new to both the practice and the precedents of military law, he never submitted to General Crowder for comment his own newly vouchsafed interpretation of section 1199—and that was the officer with whom he had worked closely for five years, who then had been an Army judge advocate for over twenty years, and served as Judge Advocate General for over six years. Instead, feeling himself securely independent in the new status with which the two-day old order under section 1132 had invested him, General Ansell bypassed, deliberately so on the evidence, the single individual who had not only been his chief but who was responsible for his becoming first a judge advocate, then a general officer, and finally Acting Judge Advocate General of the Army.

Ultimately, Secretary Baker, after personal library examination of the authorities, rejected General Ansell's expanded interpretation of the statute. But, some days earlier, just after hearing from General Crowder that the unbroken practice of JAGO had been contrary to the view advanced by his senior assistant, and that he had never even seen the Ansell memorandum, the Secretary requested General Crowder to devote more of his own time to JAGO. When the latter replied that he could do so, the Secretary revoked the order making General Ansell Acting JAG under section 1132. The only conclusion that can possibly be drawn from those last three uncontroverted steps is that, taken together, they reflected Mr. Baker's loss of confidence in General Ansell.

Plainly, therefore, the latter's power play had failed. But, equally plainly, that failure rankled, more and more as time went on. No matter what the precise subject matter of any office discussion on military justice matters thereafter, General Ansell invariably returned to and reargued the scope of section 1199. No substitute would satisfy him. He opposed the War Department proposal to amend sec-

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<sup>105</sup>Ex. E, *Hearings* at 86-88

tion 1199 so that it would plainly conform to his originally stated views. And he consistently opposed General Orders No. 7, which very largely attained the results he had first proposed.

Judge S.S. Gregory, chairman of the American Bar Association committee that reported on the Ansell proposals—and author of that committee's minority report, which in some respects was more favorable to those proposals than was the majority report<sup>106</sup>—wrote as follows to the Association's President:

General Ansell . . . is a man with a grievance. He feels that he has been unjustly treated by the military authorities. . . . [I]t seemed to me to be rather inconsistent with efficiency either in the Army or elsewhere to keep a man at the head of an important department who was continually railing at everybody in that department and denouncing its methods publicly and consistently, and also criticizing with great severity, and, as it seems to me, sometimes with marked injustice, his official superiors.<sup>107</sup>

The consequence of all the facts reviewed above was that, having failed in November 1917 to supersede his sponsor and longtime friend, having failed in January 1918 and thereafter to obtain, in precisely the way that he had originally formulated it, the precise mechanism of appellate review for which he had argued, Ansell began to hate his friend and benefactor. Examination of Ansell's 1919 testimony and outside speeches<sup>108</sup> demonstrates convincingly that "hate" is not too strong a word.

Does psychiatry have a label for such behavior? Upon inquiry, I found that it does; that profession calls it an Adjustment Disorder, and some of its members would fine-tune that diagnosis to read "Adjustment Disorder with Mixed Disturbance of Emotions and Conduct."<sup>109</sup>

Those more partial to blunt description might see in the conduct detailed above the obvious manifestations of a blemished character. But whether one prefers the elaborate classifications of contemporary medicine, or opts instead for Victorian characterizations of disesteemed behavior, the following clearly emerges.

Disagreements over the rules that should govern individual or

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<sup>106</sup>D. Lockmiller, *supra* note 3, at 212; *Hearings* at 1237-38.

<sup>107</sup>*Hearings* at 1178-82.

<sup>108</sup>*Hearings* at 51-294; D. Lockmiller, *supra* note 3, at 200-01, 204.

<sup>109</sup>Information provided by a practicing psychiatrist, a Captain (Medical Corps), USNR (Retired), who reached his conclusion after examination of the narrative above.

group relationships are invariably complex matters, so that it is impossible without sacrifice of accuracy to divide the whole of any dispute into neatly packaged but separated parts. Whenever personalities and personal hostility have significantly intruded themselves into the conflicting arguments being advanced, those factors simply cannot be ignored if the account of the entire contention is to be entirely authentic.

Earlier recitals of the World War I court-martial controversy have largely ignored, or at least substantially downplayed, the personal factors involved in the disagreements that were then widely aired. Close study of the well-nigh infinite details of that dispute, now undertaken for a fourth time over a period of more than fifty years, leads this author to three determinations:

First, it is wholly inaccurate to present that controversy as simply a professional difference of legal opinion.

Second, although it is crystal clear that the 1916 Articles of War were deficient, particularly in undertaking to govern a noncareer Army raised by compulsion, it is equally inaccurate to portray the subsequent disagreements about necessary revisions as a melodrama whose 1919 protagonist can be excused his whirling dervish conduct, and can now be deemed wholly vindicated, simply because some of his proposals were ultimately adopted by a later and presumably wiser generation.

Third, the facts summarized above have been extracted from a document of 1,400 pages, about a third of them in fine print. Those facts inescapably demonstrate the impact of the rejection of his own carefully crafted scheme for magnified authority upon the distinctly flawed personality of Samuel T. Ansell.

The foregoing is, obviously, a harsh judgment. But the evidence of record in its support is overwhelming, and the chronology is utterly damning.

General Ansell's memorandum setting aside the convictions in the Texas "mutiny" cases was dated October 30, 1917.<sup>110</sup> As a judge advocate whose service in the Army's law department had then extended to thirteen years,<sup>111</sup> he certainly knew that this was an entirely new departure from the existing practice; and he also knew, as his later testimony discloses, that, as Acting JAG simply on the basis of seniority, he was not empowered to alter existing policies.<sup>112</sup>

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<sup>110</sup>Ex. 5, *Hearings* at 774-77.

<sup>111</sup>*Hearings* at 52. See *supra* text accompanying notes 4-12.

<sup>112</sup>See *supra* note 19.

So, four days later, on November 3rd, he set in motion the steps designed to lead to his appointment as Acting JAG pursuant to section 1132 of the Revised Statutes, a status that would enable him to change all existing policies.<sup>113</sup> The War Department General Order making that appointment was issued on November 8th,<sup>114</sup> and it was not until that precise day that General Ansell's October 30th memorandum reached The Adjutant General.<sup>115</sup> But—and this is highly significant—at no time prior to November 10th, the date of his more elaborate memorandum to the Secretary of War,<sup>116</sup> did General Ansell ever show either document to General Crowder, the chief he was seeking to replace.<sup>117</sup>

General Ansell's obviously backhanded power play ultimately failed, primarily because the legal authorities upon which he sought to justify his divergence from the practice of over a half century were found to be inadequate by Secretary Baker, who personally examined in the library all of the references cited.<sup>118</sup> Plainly, it was General Ansell's failure to impose his views that soured all of his later actions, culminating in his *ad hominem* attacks on the single individual to whom he owed all the career success he had attained, his chief, Major General Crowder.

The Army's old-line judge advocates never forgave Ansell for that disloyalty.<sup>119</sup>

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<sup>113</sup>See *supra* text accompanying notes 20-23.

<sup>114</sup>*Hearings* at 53, 783; Ex. 58-62, *Hearings* at 839-46.

<sup>115</sup>*Hearings* at 731-32, 808.

<sup>116</sup>Ex. A, *Hearings* at 57-64; Ex. 32, *Hearings* at 839-46.

<sup>117</sup>*Hearings* at 1203, 1342-43.

<sup>118</sup>*Hearings* at 1343.

<sup>119</sup>On November 5, 1934, the Supreme Court held, in *Lone v. Ansell*, 292 U.S. 76 (1934), that the freedom from arrest conferred on members of Congress during sessions of that body by U.S. Const. art. I, § 6, cl. 1, did not immunize them from the service of civil complaints—in that instance an action for defamation brought by Ansell against Senator Huey Long of Louisiana.

At that time I was an Assistant Solicitor in the Department of the Interior, and knew absolutely nothing about any of the matters discussed in this article. The Supreme Court decision appeared in the evening paper, which I obtained outside the building. At that point I encountered the Governor of Puerto Rico, General Blanton Winship, who had retired as TJAG the year before, and with whom I had a very cordial relationship following numerous official contacts. Thinking in my total ignorance that the forensic success of one former judge advocate would be of interest to another former judge advocate, I mentioned the Supreme Court decision to Governor Winship. At the mere sound of Ansell's name, the Governor's features simply froze.

# SOVIET MILITARY JUSTICE AND THE CHALLENGE OF PERESTROIKA

by Captain Jody M. Prescott\*

## I. INTRODUCTION

Under the leadership of General Secretary of the Communist Party of the Soviet Union (CPSU) and President Mikhail Gorbachev, the Union of Soviet Socialist Republics (USSR) is currently embarked upon an ambitious reform effort, known as *perestroika* (restructuring).<sup>1</sup> The emphasis of *perestroika* is on economic reform and corresponding improvements in economic law, as means to resolve the Brezhnev era's legacy of slow economic growth and its attendant shortages of housing, food, and consumer goods.<sup>2</sup> In his opening address before the recent 19th CPSU Conference, General Secretary Gorbachev stressed that the success of *perestroika* depends upon the ability of the Soviet government to create a socialist state characterized by the rule of law in all areas.<sup>3</sup> Certain Soviet jurists describe this form of government as a "socialist constitutional state."<sup>4</sup> Although efforts to create such a state in the USSR have not kept pace with developments in the area of economic reform, they have resulted in some new laws that grant Soviet citizens greater legal and

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<sup>1</sup>40 The Current Digest of the Soviet Press no. 21 at 1-10 (June 22, 1988) [hereinafter CDSP]. CDSP, Foreign Broadcast Information Service, Daily Report, Soviet Union thereinafter FBIS-SOV], and Joint Publications Research Service, Soviet Union, Military Affairs [hereinafter JPRS-UMA], are compilations of translated information from various foreign media sources.

<sup>2</sup>FBIS-SOV-88-128, July 5, 1988, at 143-44; 88-018, Jan. 28, 1988, at 54.

<sup>3</sup>FBIS-SOV-88-127, July 1, 1988, at 24. Although the issue was not explicitly addressed in Gorbachev's speech, it is clear that meaningful legal reform in the Soviet judicial system can only be accomplished at the expense of the CPSU's broad and perhaps unofficial power over the operation of the Soviet legal system. FBIS-SOV-88-128, July 5, 1988, at 139-41.

<sup>4</sup>A socialist constitutional state is defined as "a state that creates acts, is directed by them, and submits itself to them." FBIS-SOV-88-018, Jan. 28, 1988, at 56.

civil rights, such as the ability to appeal administrative actions<sup>5</sup> and the right to engage in more varied forms of public demonstration.<sup>6</sup> Further, Soviet legal scholars and officials continue to promote such additional reforms as permitting the USSR Supreme Court to exercise the power of judicial review, dramatically curtailing the use of the death penalty,<sup>7</sup> and the decriminalization of many activities, such as certain forms of political expression currently prohibited under the state slander and anti-Soviet agitation and propaganda laws.<sup>8</sup>

At least as important as the broad legal reforms under consideration are the more technical measures being discussed and put into effect to improve the efficiency of the investigatory and judicial systems.<sup>9</sup> Currently, the operation of the investigatory and judicial systems is uneven at best, both in terms of work product and quality control supervision. Soviet officials and commentators have accurately perceived that the extent to which legal reform can be achieved in the Soviet Union will be determined in large part by the efficacy of the mechanisms for its administration. \*\*

Although the course of legal reform in the Soviet Union remains uncertain, civilian reforms are likely to have an effect upon Soviet military justice, for the Soviet military and civilian judicial systems are very closely integrated" and share similar problems. Further, the historical development of Soviet military law, particularly the broad reforms adopted in the late 1950's, demonstrates that the Soviet military justice system is responsive to civilian legal reform efforts.<sup>12</sup> This article will present an overview of the Soviet military justice system as it is presently organized and intended to function. Problem areas within the Soviet military justice system will be examined within this context, for such an overview accurately describes

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<sup>5</sup>See Quigley, *The New Soviet Law on Appeals: Glasnost' in the Soviet Courts*, 37 Int. & Comp. L. Q. 172-177 (1988).

<sup>6</sup>FBIS-SOV-88-149, Aug. 3, 1988, at 58-59.

<sup>7</sup>FBIS-SOV-88-018, Jan. 28, 1988, at 54-56.

<sup>8</sup>FBIS-SOV-88-080, Apr. 26, 1988, at 52.

<sup>9</sup>FBIS-SOV-88-128, July 5, 1988, at 140.

\*\*According to V. Terebilov, Chairman of the USSR Supreme Court, the basic documents pertaining to planned legal reforms were to be published by the end of 1988, and would cover criminal legislation, the investigatory process, and the court system. FBIS-SOV-88-215, Nov. 7, 1988, at 62. See FBIS-SOV-88-127, July 1, 1988, at 24-25.

\*\*Sims, *Soviet Military Law: Judicial and Non-Judicial Punishment*, 13 New Eng. L. Rev. 381, 404-05 (1979). At a conference in November 1988, military legal specialists and staff representatives met specifically to discuss the improvement of military legislation "in light of the processes taking place in the life of society." FBIS-SOV-88-213, Nov. 3, 1988, at 57.

<sup>12</sup>H. Berman and J. Spindler, *Soviet Criminal Law and Procedure: The RSFSR Codes 52-54 (1966)* [hereinafter RSFSR Codes]; Ginsburgs, *The Reform of Soviet Military Justice: 1953-58*, 20 Law in Eastern Europe 31-50 (1979).

the model of socialist legality that reforms are intended to create in practice as well as in theory.

## 11. SOVIET MILITARY JUSTICE SYSTEM

### A. MILITARY TRIBUNALS

With the exception of the **USSR** Supreme Court, the Soviet military tribunals are the only all-union (federal) courts in the Soviet legal system.<sup>13</sup> Comparable to the civilian People's Courts (city or district level courts), the lowest-level courts in the Soviet military justice system are the inferior military tribunals, which are standing courts organized at the army, flotilla, military formation, or garrison level.<sup>14</sup> The appellate authority for these courts, and courts of first instance in their own right in certain cases, are the standing military tribunals organized at the armed forces, military district, force group, or fleet levels.<sup>15</sup> At both levels, the military tribunals consist of a trained judge and two lay judges, called people's assessors, in the first instance, and of three trained judges in cases brought before a military tribunal of the upper level on appeal, either by way of cassation or supervision.<sup>16</sup> Military judges must have a higher legal education,

<sup>13</sup>**RSFSR** Codes, *supra* note 12, at 17. One form of military court is not federal, however, namely, the Officers' Comrades' Courts of Honor. Generally, Comrades' Courts are informal lay tribunals whose members are elected by general meetings of collectives, and which deal with minor infractions of the law or regulations. V. Terebilov, *The Soviet Court* 93-95 (1986).

<sup>14</sup>**Statute** on Military Tribunals art. 1 (1958, amended 1980), *translated in* Basic Documents of the Soviet Legal System 165 (W. Butler trans. & ed. 1983) [hereinafter Basic Documents]. For example, a Soviet tank army contains between two and four tank divisions and between one or two motorized rifle divisions. Combined Arms and Services Staff School, Ft. Leavenworth, Soviet Army Equipment, Organization, and Operations (E614) 241 (1985) [hereinafter Soviet Army]. Each tank division has approximately 11,470 troops, and each motorized rifle division has approximately 12,695 troops. *Id.* at 252-54.

<sup>15</sup>**Soviet Army**, *supra* note 14, at 252-54. In peacetime, there are sixteen military districts in the USSR and four groups of forces in Eastern Europe. *Id.* at 223.

<sup>16</sup>Art. 7, Basic Documents, *supra* note 14, at 166. Cassation is a term describing an appeal process in a civil law system. *See* Black's Law Dictionary 197 (5th ed. 1979). A cassational appeal may be brought by either a defendant or a prosecutor. V. Terebilov, *supra* note 13, at 142. Although a cassational appeal is not a full *de novo* review, the court "examines the record, weighs the evidence, admits newly discovered evidence if necessary, and determines whether the lower court's ruling is supported by the evidence." Minan & Morris, *Unraveling an Enigma: An Introduction to Soviet Law and the Soviet Legal System*, 19 Geo. Wash. J. Int'l & Econ. 13, 46 n.401 (1985). The grounds for cassation are: "(1) The insufficiency or incorrectness of the inquiry proceedings both prior to and at the trial; (2) Material violations of the rules of procedure; (3) A violation or incorrect interpretation of the substantive law; (4) A plainly unjust verdict or sentence." J. Zelitch, *Soviet Administration of Criminal Law* 290-91 (1931). A supervisory appeal means that the "corresponding procurator or chairman of a higher court is entitled to submit his protest to the presidium of a regional, territory or other court equal in status, if he considers the respective judgment, decision or rider passed by a People's Court to be wrong or unlawful." V. Terebilov, *supra* note 13, at 127.

be at least twenty-five years old, and are elected to their positions for five-year terms by the Presidium of the USSR Supreme Soviet.<sup>17</sup> People's assessors need only be twenty-one years old, are elected by military service members for terms of two and one-half years, and are vested with all of the rights of a judge in court.<sup>18</sup> People's assessors serve on the bench for only two weeks per year and they then return to their regular duties.<sup>19</sup> Both judges and people's assessors must be on active military duty.<sup>20</sup>

The appellate court for the superior military tribunals is the Military Division of the USSR Supreme Court, and the Military Division's appellate authority is a plenary session of the USSR Supreme Court itself.<sup>21</sup> Unlike an American military accused, who may appeal a court-martial conviction through one of the service courts of review, the United States Court of Military Appeals, and finally to the United States Supreme Court,<sup>22</sup> a Soviet military accused, like his civilian counterpart, is limited to one cassational appeal to the next highest court.<sup>23</sup> Soviet military tribunals have jurisdiction over all crimes committed by military service members, quasi-military personnel of state security agencies, and certain crimes such as espionage, even if committed by civilians.<sup>24</sup> In geographic areas where there are no civilian courts, military tribunals may try both criminal and civil cases.<sup>25</sup> Military tribunals also have jurisdiction over civil suits brought by victims in conjunction with military criminal cases for damages related to the criminal acts.<sup>26</sup> When criminal acts involve either an offense or an accused which fall within the jurisdiction of a military tribunal, all cases arising out of that offense are brought before a military tribunal.<sup>27</sup> Jurisdiction is divided among the mili-

<sup>17</sup>Statute on Military Tribunals art. 5, Basic Documents, *supra* note 14, at 165.

<sup>18</sup>Art. 6, *id.* at 166. The Soviet Union elected 12,122 judges and 850,344 people's assessors to the People's Courts in 1987. FBIS-SOV-87-232, Dec. 3, 1987, at 79.

<sup>19</sup>See Minan & Morris, *supra* note 16, at 1-58.

<sup>20</sup>Statute on Military Tribunals arts. 5 and 6, Basic Documents, *supra* note 14, at 165-166.

<sup>21</sup>RSFSR Codes, *supra* note 12, at 108.

<sup>22</sup>Uniform Code of Military Justice art. 66(b), (h)(1), 10 U.S.C. § 866(b), (h)(1) (Supp. IV 1986) [hereinafter UCMJ].

<sup>23</sup>The Law of the Soviet State 520 (A. Vyshinsky ed., H. Babb trans. 1979). Likewise, UCMJ art. 66(c) allows the American service court of review to assess the evidence of record and the credibility of the witnesses before the trial court.

<sup>24</sup>Statute on Military Tribunals art. 11, Basic Documents, *supra* note 14, at 166. In the American military justice system, *in personam* jurisdiction depends solely on an accused's status as a member of the armed forces. *Solorio v. United States*, 107 S. Ct. 2924, *rehearing denied*, 108 S. Ct. 30 (1987).

<sup>25</sup>Statute on Military Tribunals art. 12, Basic Documents, *supra* note 14, at 166-67.

<sup>26</sup>Art. 13, *id.* at 167.

<sup>27</sup>Art. 14, *id.*



tary tribunals on the basis of rank of the accused and the seriousness of the offense. The lower level military tribunals have jurisdiction over service members up to and including the rank of lieutenant colonel (army) and second captain (naval);<sup>28</sup> and the higher level standing military tribunals have jurisdiction over personnel of the ranks of colonel and first captain, or who occupy a position equivalent to field commander or first warship commander, and all crimes which provide for a death sentence during peacetime.<sup>29</sup> The Military Division of the Supreme Court has original jurisdiction over cases of "exceptional importance," and cases concerning crimes of personnel holding the rank of general or admiral, or equivalent in responsibility to a formation commander.<sup>30</sup> Regardless of jurisdictional distinctions, any superior military tribunal, including the Military Division of the USSR Supreme Court, has "the right to take jurisdiction as a court of first instance over any case within the jurisdiction of an inferior military tribunal."<sup>31</sup>

The Soviet Constitution provides that there shall be "unity of legislative regulation throughout the territory of the USSR, [and] the establishment of Fundamental Principles of Legislation of the USSR and the Union Republics."<sup>32</sup> The Fundamental Principles are a set of all-union codes, each of which covers the principles applicable to a specific legal area, such as criminal procedure or court organization.<sup>33</sup> The law of each union republic consists of a series of legislative codes based upon these Fundamental Principles, with slight variations depending upon local custom.<sup>34</sup> To the extent that all-union law does not apply, military tribunals apply the substantive law of the republic that was the situs of the crime, and the procedural law of the republic in which the tribunal is located.<sup>35</sup> Soviet military

<sup>28</sup>Art. 16, *id.* Both Soviet ranks are equivalent to the rank of Lieutenant Colonel in the United States Army. H. Scott and W. Scott, *The Armed Forces of the USSR*, Table B1 (1979).

<sup>29</sup>Statute on Military Tribunals art. 17, Basic Documents, *supra* note 14, at 167. Both Soviet ranks are equivalent to the rank of Colonel in the United States Army. H. Scott and W. Scott, *supra* note 28, Table B1.

<sup>30</sup>Statute on Military Tribunals art. 18, Basic Documents, *supra* note 14, at 167. A degree of rank and offense differentiated jurisdiction exists in the American system as well. General courts-martial may try all military personnel for any offense, UCMJ art. 18; special courts-martial have jurisdiction over all military personnel for noncapital offenses, UCMJ art. 19; and summary courts-martial have jurisdiction over only enlisted personnel for noncapital offenses, UCMJ art. 20.

<sup>31</sup>Statute on Military Tribunals art. 20, Basic Documents, *supra* note 14, at 168.

<sup>32</sup>Const. USSR art. 73 (1977, amended 1981), *translated in* Basic Documents, *supra* note 14, at 16.

<sup>33</sup>See RSFSR Codes, *supra* note 12, at 19-22.

<sup>34</sup>*Id.*; Sims, *supra* note 11, at 401.

offenses themselves are proscribed in each of the union republic's criminal codes,<sup>36</sup> and as previously noted, military tribunals are competent to apply civil law in certain cases.

## ***B. MILITARY PROCURACY***

The Procurator (Prosecutor) General of the USSR, a synthesis of both an Attorney General and an Inspector General,<sup>37</sup> is appointed by the USSR Supreme Soviet.<sup>38</sup> The Procurator General appoints the various Procurators of the union republics, autonomous republics, territories, regions, and autonomous regions.<sup>39</sup> In turn, the Procurators of cities, districts, and autonomous national areas are appointed by the union republic procurators, but their appointments must be confirmed by the Procurator General.<sup>40</sup> The term of office for all Procurators is five years.<sup>41</sup> The Procuracy is given the responsibility for supervising and reviewing the legality of all actions taken by any organization or individual.<sup>42</sup> The Procuracy is therefore given commensurately broad powers to guide and to correct the course of any official investigation and to supervise "the execution of laws when cases are considered in courts."<sup>43</sup> Although the Procuracy is independent of all local controls, and is responsible only to the Procurator General,<sup>44</sup> it is required to observe the independence of the judiciary.<sup>45</sup>

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<sup>35</sup>RSFSR Codes, *supra* note 12, at 107-08; V. Terebilov, *supra* note 13, at 142-43. Article 3 of the Statute on Military Tribunals provides that they are "guided by the USSR Constitution, the Fundamental Principles of Legislation of the USSR and the Union Republics on Court Organization in the USSR, the present statute, other USSR legislation, and also Union Republic legislation." Basic Documents, *supra* note 14, at 165. Such legislation includes the Disciplinary Charter of the Armed forces of the USSR (1975, amended 1980), translated in 4 W. Butler, Collected Legislation of the Union of Soviet Socialist Republics and Constituent Union Republics ch. VI-3, 1-46 (1985) [hereinafter Collected Legislation]. For a thorough description of the content of the Disciplinary Charter and its application with regard to nonjudicial punishment in the Soviet military, see Sims, *supra* note 11, at 388-96.

"For example, Russian Soviet Federated Socialist Republic Criminal Code arts. 237-269 (1983) proscribe military offenses. Basic Documents, *supra* note 14, at 384-93. Cf. UCMJ arts. 83-117 (the specific portion of the United States Code that proscribes American offenses of a typically military nature).

<sup>37</sup>RSFSR Codes, *supra* note 12, at 116. The Procuracy's imperial antecedents date back at least to 1722, when Peter the Great created a Procuracy to supervise the actions of government agencies and officials to ensure the legality of their actions. S. Kucherov, Courts, Lawyers, And Trials Under The Last Three Tsars 93 (1953).

<sup>38</sup>Law on the Procuracy of the USSR art. 6 (1979, amended 1982), translated in Basic Documents, *supra* note 14, at 175.

<sup>39</sup>Art. 7, *id.*

<sup>40</sup>*Id.*

<sup>41</sup>Art. 8, *id.*

<sup>42</sup>Art. 1, *id.* at 173.

<sup>43</sup>Art. 3, *id.*

<sup>44</sup>Art. 4, *id.* at 174.

<sup>45</sup>Art. 31, *id.* at 185.

Within the Procuracy of the USSR, there exists a separate Military Procuracy.<sup>46</sup> The Chief Military Procurator is appointed by the Presidium of the USSR Supreme Soviet on the basis of the Procurator General's recommendation.<sup>47</sup> The Chief Military Procurator in turn recommends nominees for the Military Procuracy at the armed forces branch, military district, and fleet level to the Procurator General.<sup>48</sup> Military Procurators at the army and flotilla level, however, are appointed by the Chief Military Procurator and confirmed by the Procurator General.<sup>49</sup> Military Procurators must be at least twenty-five years old and have a higher legal education, or obtain an individual waiver of the educational requirement from the Procurator General.<sup>50</sup>

In addition to conducting its own preliminary investigation into an alleged offense, the Military Procuracy also supervises the investigations of the military organs of inquiry.<sup>51</sup> Soviet military commanders have the authority to appoint investigators to inquire into all crimes committed by subordinate personnel.<sup>52</sup> If the crime is one that does not require a preliminary investigation by the Military Procuracy, the investigatory officer proceeds with an inquiry into the alleged offense, which culminates in either the drafting of an indictment or a decree terminating the inquiry.<sup>53</sup> Where the crime requires a preliminary investigation by the Military Procuracy, the commander is still required to institute an inquiry, but must restrict its scope to the preservation of evidence.<sup>54</sup>

<sup>46</sup>Art. 14, *id.* at 176.

<sup>47</sup>Art. 17, *id.* at 178.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>Art. 20, *id.* at 179.

<sup>51</sup>RSFSR Codes, *supra* note 12, at 113. Preliminary investigations are conducted by the Procuracy, the Ministry of the Interior, and the State Security Committee (KGB) and are used to investigate the more dangerous and complex crimes. Inquiries are investigations conducted by the police, and concern less serious crimes and matters. V. Terebilov, *supra* note 13, at 76.

<sup>52</sup>V. Terebilov, *supra* note 13, at 76; Spravochnik Ofitsera Po Sovetskому Zakon-datel' Stvu (Officers' Handbook on Soviet Legislation) (I. Pobezhimov & B. Viktorov, ed. 1966), translated in United States Department of Commerce Joint Publications Research Service 465778 at 47 (1968).

<sup>53</sup>I. Pobezhimov, *supra* note 52, at 479. For those misdemeanors which will obviously be settled through disciplinary action (nonjudicial punishment), an administrative investigation is conducted rather than a formal inquiry. *Id.* at 477; Sims, *supra* note 11, at 393-94. Cf. Army Reg. 15-6, Procedures for Investigating Officers and Boards of Officers, para. 1-4 (11 May 1988) (American military administrative fact-finding proceedings may be either informal investigations by a single investigating officer, or boards of officers that "involve more than one investigating officer using formal or informal procedures or a single investigating officer using formal proceedings.")

<sup>54</sup>I. Pobezhimov, *supra* note 52, at 479-80; V. Terebilov, *supra* note 13, at 217.

The preliminary investigation is conducted by an examining official (investigator) from the Military Procuracy.<sup>55</sup> In keeping with the civil law nature of the Soviet system, both the witnesses and the accused are subject to questioning by the investigator during the investigation.<sup>56</sup> If, as a result of the investigation, the Military Procurator determines that sufficient evidence exists to indict the suspect, an indictment is then presented to the appropriate military tribunal.<sup>57</sup>

In exercising its supervisory function over the courts, the Procuracy is allowed to protest court actions that it believes are unfounded or illegal<sup>58</sup> either by cassation<sup>59</sup> or supervision<sup>60</sup> to the next higher court. In the military justice system, the Chief Military Procurator can protest any action of a military tribunal by way of supervision to the next highest court, and the Chief Military Procurator's deputies and the procurators at the military district or fleet level can protest any decision of a lower military tribunal at the army or flotilla level.<sup>61</sup>

### C. THE DEFENSE BAR

Unlike the American military justice system,<sup>62</sup> the Soviet system does not automatically provide military defense counsel to defendants before its courts.<sup>63</sup> A Soviet military accused must instead procure the services of a civilian lawyer if he chooses to exercise his constitutional right to representation.<sup>64</sup> The lack of a criminal defense

<sup>55</sup>Law on the Procuracy art. 18, Basic Documents, *supra* note 14, at 178. The investigator may not function as a prosecutor in the case if it goes to trial. *See* Case of Bashirov, Bull. Verkh. Suda RSFSR, no. 5, p.9 (1977); reported in J. Hazard, W. Butler, & P. Maggs, *The Soviet Legal System: The Law in the 1980's* 59 (1984) [hereinafter *Soviet Legal System*]. *Cf.* UCMJ art. 32 (A hearing which thoroughly investigates the substance and form of the charges is required before the charges are referred to a general court-martial. The accused is represented by counsel, and has the right to cross-examine witnesses.).

<sup>56</sup>"[T]he procurator shall . . . summon officials and citizens and demand from them oral or written explanations regarding violations of the law." Law on the Procuracy art. 23(5), Basic Documents, *supra* note 14, at 185.

<sup>57</sup>Sims, *supra* note 11, at 418.

<sup>58</sup>Law on the Procuracy, art. 32, Basic Documents, *supra* note 14, at 185.

<sup>59</sup>Art. 33, *id.*

<sup>60</sup>Art. 35, *id.* at 185-86.

<sup>61</sup>*Id.* at 186.

<sup>62</sup>UCMJ arts. 27, 38.

<sup>63</sup>Unless perhaps they are statutorily exempt from having to pay for legal services. V. Terebilov, *supra* note 13, at 54. *See* Case of Muzykin, *et al.*, reported in H. Berman & M. Kerner, *Soviet Military Law and Administration* 161-62 (1955) [hereinafter *Soviet Military Law*].

<sup>64</sup>For example, in the *Case of Kochkin*, The Military Division of the Supreme Court set aside the verdict because the civilian counsel who was to represent the military appellant in the hearing on appeal never received notice of the hearing. *Reported in*

branch of the Soviet military justice system is not surprising in light of the high degree of integration between Soviet military and civilian justice, and the relatively limited trial role of the Soviet defense counsel.<sup>65</sup>

*Aduokatura* (advocates) in the Soviet Union are an anomaly, for until recently they were the only profession whose non-state employment was encouraged by the government.<sup>66</sup> The Soviet Constitution provides that *aduokatura* shall be organized into colleges, and shall function to provide legal assistance to citizens and organizations.<sup>67</sup> Local colleges are created with the approval of the respective union republic Ministries of Justice.<sup>68</sup> To become a member of a college, an individual must have a formal legal education and two years of juridical experience. Those without two years of experience must undergo a probation period of between six months and one year before admission to a college. The admission procedure is determined by the respective union republic statute on *advokatura*,<sup>69</sup> but the fate of an individual's application is probably in the hands of the Presidium, the college's executive body.<sup>70</sup> The Presidium itself is elected by the members at a general meeting of the college, and its members serve for a term of three years.<sup>71</sup>

Although clients may directly retain specific attorneys by agreement,<sup>72</sup> they do not directly pay their attorneys. Instead, payments

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Soviet Legal System, *supra* note 55, at 71. In imperial military tribunals, civilian accused were represented by civilian lawyers while military personnel were apparently represented by nonlawyer military counsel. S. Kucherov, *supra* note 37, at 50. Because combat conditions in World War II often made it impossible to secure lawyers to act as defense counsel, military tribunals often avoided the defendants' right to representation by trying cases without representatives for the government or for the defendants. Soviet Military Law, *supra* note 63, at 113.

<sup>65</sup>See *infra* notes 172-179 and accompanying text.

<sup>66</sup>Pipko & Pipko, *Inside the Soviet Bar: A View from the Outside*, 21 Int'l Law. 853, 854-55 (1987) [hereinafter Pipko]. In the Soviet Union, advocates are distinct from juriconsults, who are salaried legal advisors to national and local governmental agencies, state enterprises, and state or collective farms. W. Butler, Soviet Law 84 (1983 ed.) [hereinafter Soviet Law].

<sup>67</sup>Const. USSR art. 161, Basic Documents, *supra* note 14, at 31.

<sup>68</sup>Law on the *Aduokatura*, art. 3 (1979), translated in Basic Documents, *supra* note 14, at 203.

<sup>69</sup>Article 5, *id.* at 204.

<sup>70</sup>RSFSR Codes, *supra* note 12, at 120. The Presidium has the power to impose disciplinary sanctions upon offending attorneys, and to expel a member from a college for "the systematic violation of the internal labor order or of his duties," if the offender has been previously disciplined. Law on the *Aduokatura* art. 14, Basic Documents, *supra* note 14, at 207. Expulsion may be appealed to a People's Court within one month of the Presidium's decision. *Zd.*

<sup>71</sup>Art. 4, *id.* at 204.

<sup>72</sup>Pipko, *supra* note 66, at 868-69. If the attorney has been retained by agreement, the client pays the full amount to the legal consultation office at once. If the attorney

for legal fees are forwarded by the client to the legal consultation office of the college.<sup>73</sup> Approximately fifteen<sup>74</sup> to thirty<sup>75</sup> percent of any fee is deducted to pay for the expenses of the Presidium and the college, and the remainder is credited to the attorney's account with the college.<sup>76</sup> Certain clients are exempt from paying for legal services, indigents for example, and their cases are assigned to a college by the trial court.<sup>77</sup> Attorneys appointed to represent exempted clients are then remunerated from the general account of the college for their services.<sup>78</sup>

## 111. RESTRUCTURING IN THE SOVIET MILITARY JUSTICE SYSTEM

The Resolution on Legal Reform, issued by the recent 19th CPSU Conference, recognizes that although restructuring of the legal system has been ongoing since the April 1985 CPSU Central Committee Plenum, current reform measures are incomplete. Accordingly, the Resolution states that "in the next few years it will be necessary to conduct a broad legal reform designed to insure paramountcy of the law in all spheres of society's life."<sup>79</sup> To achieve this, the Resolution calls for substantial reforms in the Soviet court system, the Procuracy, the police investigatory bodies, and the defense bar.<sup>80</sup> Due to the lack of complete information about current problems in the Soviet military justice system, it is necessary to supplement any discussion of the military system with reference to its civilian counterpart. Given the high degree of integration between the two systems, however, such references appear reliable.<sup>81</sup>

### A. MILITARY TRIBUNALS

With regard to the courts, the Chairmen of the Military Tribunals have recognized the need to enhance the professional standards of the military judiciary and the quality of the administration of justice in the military tribunals." The Resolution on Legal Reform suggests a

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has been assigned to the client by the consultation office, however, the legal fees are paid in monthly installments by deductions from the client's paycheck. *Id.* at 869.

<sup>73</sup>Law on the *Advokatura* art. 8, Basic Documents, *supra* note 14, at 205.

<sup>74</sup>RSFSR Codes, *supra* note 12, at 122.

<sup>75</sup>Law on the *Advokatura* art. 15, Basic Documents, *supra* note 14, at 207.

<sup>76</sup>Art. 10, *id.* at 205.

<sup>77</sup>Art. 11, *id.* at 205-06.

<sup>78</sup>*Id.*

<sup>79</sup>FBIS-SOV-88-128, July 5, 1988, at 139.

<sup>80</sup>*Id.* at 140.

<sup>81</sup>FBIS-SOV-88-083, Apr. 29, 1988, at 69.

<sup>82</sup>FBIS-SOV-88-001, Jan. 4, 1988, at 68.

two-pronged approach in order to enhance the role of the courts, first by increasing the quality of their internal operations, and second by insuring their independence from nonjudicial authority.<sup>83</sup> The quality of court proceedings is to be improved primarily by focusing upon three interrelated problems in the Soviet judicial system: 1) a pervasive bias toward the prosecution; 2) the lack of an "adversarial" nature to the courts' proceedings; and 3) the functional absence of the presumption of innocence.<sup>84</sup>

The legal concept of the presumption of innocence is clearly present in Soviet law. A Soviet court cannot convict an accused unless it is convinced of his guilt beyond a reasonable doubt; the accused has a right to a defense but no obligation to present evidence in order to prove his innocence; and there is no inference of guilt from the fact of the indictment.<sup>85</sup> The USSR Supreme Court itself has stated in a plenary session resolution that an accused is "considered innocent until his guilt has been proven under the procedure provided for by law and established by a court verdict that has entered into force."<sup>86</sup>

The Soviet public, however, has a strong perception that a person is guilty once he becomes the subject of a preliminary investigation.<sup>87</sup> In fact, some people demand to go to trial after an investigation has been discontinued in order to be publicly acquitted." More unsettling is the perception of the guilt of the accused held by trial judges. One survey of judges (736 respondents), indicated that almost half often believe that an accused is guilty before the trial begins, and forty-three percent always formed such a preconception.<sup>89</sup>

Unlike the American system, with its emphasis upon the facts of a case being decided at trial, the civil law nature of the Soviet legal system makes the preliminary investigation the most important area for the application of the presumption of innocence and developing the facts of the case.<sup>90</sup> Unfortunately, the Soviet preliminary inves-

<sup>83</sup>FBIS-SOV-88-128, July 5, 1988, at 140.

<sup>84</sup>*Id.* In the context of the Soviet legal system, "adversarial" means that "all participants in a trial have equal rights in proving the facts and . . . an equal opportunity to uphold before the court their own interests." 38 CDSP no. 42, at 2 (Nov. 19, 1986).

<sup>85</sup>Berman, *The Presumption of Innocence: Another Reply*, 28 Am. J. Comp. L. 623, 577-623 (1980).

<sup>86</sup>39 CDSP no. 20 at 8 (June 17, 1987).

<sup>87</sup>*Id.* at 9. Although an investigator is required to send a copy of the discontinuance resolution to the prosecutor, and notify the accused and victim in writing when an investigation is discontinued, such notification is frequently not made. FBIS-SOV-88-099, May 23, 1988, at 72.

<sup>88</sup>38 CDSP no. 42 at 4 (Nov. 27, 1986).

<sup>89</sup>39 CDSP no. 20 at 8 (June 17, 1987).

<sup>90</sup>Huskey, *The Politics of the Soviet Criminal Process: Expanding the Right to Counsel in Pretrial Proceedings*, 34 Am. J. Comp. L. 93, 93-112 (1986).

tigation is often not conducted as thoroughly and independently as its continental European counterparts, and the results are therefore of dubious value in many cases."

Judges often compound the problem of poorly conducted investigations by accepting the results of the investigation at face value, and repeating the procurator's arguments in their findings." Further, many judges display a tendency to rely heavily upon confessions that result from the preliminary investigation or police inquiry, and particularly upon tape-recorded or videotaped confessions, despite repudiations by the defendants at trial.<sup>93</sup> Given the interrogatory role of the judge, the "adversarial" (from an American point of view, inquisitorial) nature of the proceedings is also weakened by the passivity of the people's assessors, who are often overawed by the judge or are unfamiliar with the case, and therefore fail to ask questions of either the judge or the witnesses at trial.<sup>94</sup>

Suggested solutions for these problems include requiring investigatory agencies to give formal notification of the discontinuance of investigations, and even requiring court approval before suspects may be arrested or confined.<sup>95</sup> There has also been a great deal of discussion in the Soviet press concerning the need for legislation explicitly setting out the functional concept of the presumption of innocence.<sup>96</sup> Although the need for courts to order further investigation of a case when the evidence before them is incomplete has been recognized and recently reaffirmed by V. Terebilov, Chairman of the USSR Supreme Court, courts are being encouraged to acquit defendants when the evidence shows that they are not guilty, instead of cautiously passing the case back to the investigator in the hope that the investigation will be dropped.<sup>97</sup>

The Resolution on Legal Reform also explicitly mentions the application of the principle of *glasnost* (openness) to the selection of judges as another method to improve the quality of the courts' operations." Currently, the authority to select a candidate for the

<sup>91</sup>*Id.* at 94 n.3. See notes 128-31 *infra* and accompanying text.

<sup>92</sup>FBIS-SOV-87-232, Dec. 3, 1987, at 81.

<sup>93</sup>39 CDSP no. 20 at 10 (June 17, 1987).

<sup>94</sup>*Id.*

<sup>95</sup>Const. USSR art. 54 provides that "no one may be subjected to arrest other than on the basis of a judicial decision or with the sanction of a procurator." Basic Documents, *supra* note 14, at 14. A procurator can apparently authorize detention of a suspect for up to 72 hours on the basis of *prima facie* evidence. FBIS-SOV-88-099, May 23, 1988, at 70; 39 CDSP no. 22 at 9 (July 1, 1987).

<sup>96</sup>39 CDSP no. 20 at 10 (June 17, 1987).

<sup>97</sup>*Id.* at 9. On the average, courts return approximately 60,000-70,000 criminal cases for reexamination each year. FBIS-SOV-87-232. Dec. 3. 1987. at 80.

<sup>98</sup>FBIS-SOV-88-128, July 5, 1988, at 140.



People's Court rests with the local CPSU committee, despite the subsequent election of that person by the public.<sup>99</sup> If more than one candidate were nominated, as has been recommended by Soviet legal scholars, and the qualifications of each were revealed and discussed, the electorate would then be able to choose the best qualified individual.<sup>100</sup> Further, *glasnost* would be helpful in exposing the shortcomings of judges already on the bench, which would lead to a more educated use of the people's right to recall judges."

The second prong of the effort to enhance the role of the court is to increase its independence from the influence of local authorities who intervene in court proceedings.<sup>102</sup> Article 10 of the Fundamental Principles of Criminal Procedure of the USSR and Union Republics explicitly prohibits outside pressure being applied to judges in their consideration of cases.<sup>103</sup> Despite this mandate, Chairman Terebilov has identified extrajudicial pressure, so-called "telephone law,"<sup>104</sup> as the most significant obstacle impeding efforts to restructure the Soviet court system.<sup>105</sup> People's Court judges, due to their nomination as candidates by local CPSU committees, their short tenure in office, their lack of practical training, and perhaps their relative youth, are particularly susceptible to outside influences.<sup>106</sup> Recognizing their vulnerability, the Resolution on Legal Reform specifically suggests the promulgation of "concrete measures of responsibility for interference in [court] activities," such as imbuing the courts with contempt powers. The Resolution also suggests that People's Court judges be elected to longer terms by Soviets of People's Deputies.<sup>107</sup> On the

<sup>99</sup>39 CDSP no. 23 at 19 (July 8, 1987).

<sup>100</sup>FBIS-SOV-87-232, Dec. 3, 1987, at 81.

<sup>101</sup>One hundred sixty-three judges were recalled by their respective electorates between 1983 and 1987, FBIS-SOV-87-232, Dec. 3, 1987, at 79, as provided by Const. USSR art. 151, Basic Documents, *supra* note 14, at 30.

<sup>102</sup>FBIS-SOV-88-128, July 5, 1988, at 140.

<sup>103</sup>Fundamental Principles of Criminal Procedure of the USSR and Union Republics art. 10 (1979), Collected Legislation, *supra* note 35, ch. VII-9, at 6 (1985).

<sup>104</sup>39 CDSP no. 20 at 8 (June 17, 1987).

<sup>105</sup>FBIS-SOV-87-232, Dec. 3, 1987, at 79.

<sup>106</sup>40 CDSP no. 20 at 23 (June 15, 1988). In the 1987 elections, approximately one-quarter of the 15,000 candidates had never before been judges. 39 CDSP no. 23 at 19 (July 8, 1987).

<sup>107</sup>FBIS-SOV-88-128, July 5, 1988, at 140. With respect to reducing outside influence on the judicial system, the military tribunals already appear more structurally independent than their civilian counterparts, for as previously noted, military judges are elected by the USSR Supreme Soviet. In light of the responsibility of the military tribunal chairmen to increase their degree of coordination with commanders, political organs, and military procurators, FBIS-SOV-88-001, Jan. 4, 1988, at 68, command influence upon the judicial process does not appear to be an issue in the Soviet military justice system to the extent that it is in the American system. *See* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 107 S. Ct. 1289 (1987).

basis of the Resolution, the CPSU Central Committee has apparently settled on ten years as the proper length for a judge's term of office."<sup>108</sup> Proposals also exist to require judges elected to higher courts to have at least five years of juridical experience, including at least three years as judges.<sup>109</sup> Further, the Resolution on Legal Reform calls for the most complex cases to be tried by court panels, including a larger number of people's assessors, who are perceived as being less susceptible to "telephone" pressure."<sup>110</sup>

## **B. THE MILITARY PROCURACY**

Major General V. Popov, the Chief Military Procurator, has identified the lack of proper procuratorial supervision over officials' actions and a decrease in procuratorial independence as the two major problems with the operation of the Military Procuracy.<sup>111</sup> In accordance with the CPSU Resolution on Measures to Increase the Role of the Procurator's Oversight in Strengthening Socialist Legality and Law and Order (Resolution on the Procuracy), which requires the Military Procuracy to shift its "center of gravity"<sup>112</sup> to "checking the execution of laws by military administrative organs and all Army and Navy personnel," the Military Procuracy has recognized the need for greater supervision on its part to eliminate illegal and nonregulation actions by commanders and officials.<sup>113</sup> Violations of this type include such military infractions as the issuance of illegal orders (even over objection by the Military Procuracy),<sup>114</sup> violations of safety regulations with regard to construction and the use of military equipment,<sup>115</sup> and violations of combat standby status regula-

<sup>108</sup>FBIS-SOV-88-150, Aug. 4, 1988, p. 59.

<sup>109</sup>*Id.* at 60.

<sup>110</sup>In addition to being perceived as less susceptible to extrajudicial influences, Soviet legal scholars also cite studies indicating that assessors tend to be more fair and humane than judges in setting penalties. 39 CDSP no. 20 at 8 (June 17, 1987). The concept of the jury is not unknown in the Soviet Union, for Imperial Russia made extensive use of juries in an increasing number of regions within the empire after their introduction in 1864. The use of juries was so successful that their introduction throughout the empire was being considered on the eve of World War I. S. Kucherov, *supra* note 37, at 51-86. Interestingly, the Resolution on Legal reform does not call for a corresponding increase in the number of judges. By way of comparison, the Federal Republic of Germany has approximately 17,000 judges for a population of 61 million, while the Soviet Union has approximately 15,000 judges for a population of 284 million. FBIS-SOV-88-018, Jan. 28, 1988, at 55. The Resolution also does not mention the material difficulties faced by the Soviet courts due to the shortage of automatic data processing equipment. 40 CDSP no. 20 at 23 (June 15, 1988); 39 CDSP no. 23 at 19 (July 8, 1987); 39 CDSP no. 20 at 8 (June 17, 1987).

<sup>111</sup>FBIS-SOV-88-083, Apr. 29, 1988, at 69-70.

<sup>112</sup>39 CDSP no. 25 at 19-20 (July 22, 1987).

<sup>113</sup>FBIS-SOV-87-230, Dec. 1, 1987, at 84-85.

<sup>114</sup>FBIS-SOV-88-083, Apr. 29, 1988, at 69.

<sup>115</sup>FBIS-SOV-87-217, Nov. 10, 1987, at 81.

tions.<sup>116</sup> Administrative violations such as report padding<sup>117</sup> and the ignoring of other military infractions by military commanders and officials are apparently frequent as well.<sup>118</sup>

For the last two years, an experimental program in the Moscow Military District has employed legal specialists as consultants to unit commanders and headquarters units. As a result of having legal expertise available (and probably actively operating in a supervisory fashion), the quality of the administrative work has increased, and the crime rate and the occurrence of "gross disciplinary offenses" has decreased. This program is apparently so successful that the Soviet military is considering the "permanent appointment of legal consultants" throughout the military.<sup>119</sup> In this regard, the greater use of the principle of *glasnost* would be particularly helpful in eliminating these sorts of problems in the military, because the pretext of state and military security is too often used as a means to escape monitoring.<sup>120</sup> The Military Procuracy has also recognized the need for increased support and protection for whistle blowers, for unsurprisingly, such individuals are often quickly transferred if they bring complaints,<sup>121</sup> or are even formally reprimanded.<sup>122</sup>

The independence of the Military Procuracy has been eroded by the interference of local and perhaps even departmental interests, such that bribery and report padding have occurred with some frequency. Further, local CPSU officials have interfered in the functions of the Military Procuracy by means of administrative fiat.<sup>123</sup> To eliminate these problems, the Military Procuracy has already increased its efforts to purge itself of internal corruption.<sup>124</sup> As required by the CPSU Resolution on the Procuracy, it will probably complement these efforts by providing continuing professional education to Military Procurators as well.<sup>125</sup> The Resolution on the Procuracy also suggests that the Procuracy be granted increased injunctive powers to more effectively enforce its supervision.<sup>126</sup>

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<sup>116</sup>FBIS-SOV-87-230, Dec. 1, 1987, at 84-85.

<sup>117</sup>*Id.*

<sup>118</sup>FBIS-SOV-87-217, Nov. 10, 1987, at 81.

<sup>119</sup>Army Times, July 4, 1988, at 13, col. 1. The routine activities of such a legal advisor at the division level are very well described in JPRS- UMA-88-013, July 7, 1988, at 4-5.

<sup>120</sup>FBIS-SOV-88-070, Apr. 12, 1988, at 60.

<sup>121</sup>FBIS-SOV-88-066, Apr. 6, 1988, at 72.

<sup>122</sup>Gross, *Glasnost: Roots and Practice*, 36 Problems of Communism 77, 79 (1987).

<sup>123</sup>FBIS-SOV-88-083, Apr. 29, 1988, at 69.

<sup>124</sup>FBIS-SOV-88-070, Apr. 12, 1988, at 60.

<sup>125</sup>39 CDSP no. 25 at 20 (July 25, 1987).

<sup>126</sup>FBIS-SOV-88-171, Sep. 3, 1987, at 29-30.

Although it is unknown to what extent the problem exists in the Military Procuracy and the military investigative bodies, a major concern of the civilian Procuracy is the often poor quality of pretrial investigations and police inquiries.<sup>127</sup> This problem is caused by the lack of specialized training,<sup>128</sup> correspondingly low standards of professionalism among investigatory personnel,<sup>129</sup> and even the use of illegal methods of coercion, such as the deliberate detention of witnesses and suspects by the police to exert psychological pressure upon them and to make their case seem "weightier" to the court.<sup>130</sup> Further, although police inquiries may be developed to the point where they may be referred to trial without the benefit of a preliminary investigation, these inquiries are often conducted by unqualified police personnel.<sup>131</sup>

With regard to improving the quality of the police and Procuracy investigations, the Resolution on Legal Reform recognizes that increased professionalism in the conduct of investigations is required, as well as greater procuratorial supervision.<sup>132</sup> One method which has proven effective in enhancing the Procuracy's internal supervision has been to send senior investigative officials and investigative specialists out to field offices to inspect the quality of the investigations conducted.<sup>133</sup> One suggested reform, voiced by police Colonel A. Gulyayev, is to eliminate the police inquiry altogether, allowing the police to concentrate on the actual investigation itself.<sup>134</sup>

As for the relationship between the organs of inquiry and the prosecuting Procurator, the prosecutor's involvement in the investigations is at present more directory than supervisory.<sup>135</sup> Thus, an unscrupulous prosecutor has an opportunity to conceal defects in the investigation.<sup>136</sup> Further, the prosecutor's involvement with the investigation casts doubt upon his ability to remain objective before the court at trial.<sup>137</sup> The problem with the current relationship between the investigator and the prosecutor is clearly shown by an investigator's tendency to describe the "maximum" crime possible on the basis of the evidence. This often avoids the possibility of a court sending the case back for further investigation, because the court can always

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<sup>127</sup>39 CDSP no. 22 at 8 (July 1, 1987).

<sup>128</sup>39 CDSP no. 25 at 20 (July 22, 1987).

<sup>129</sup>40 CDSP no. 4 at 8 (Feb. 24, 1987).

<sup>130</sup>39 CDSP no. 22 at 9 (July 1, 1987).

<sup>131</sup>39 CDSP no. 25 at 20 (July 25, 1987); 39 CDSP no. 22 at 9 (July 1, 1987).

<sup>132</sup>FBIS-SOV-88-128, July 5, 1988, at 140.

<sup>133</sup>FBIS-SOV-88-067, Apr. 7, 1988, at 38.

<sup>134</sup>39 CDSP no. 22 at 9 (July 1, 1987).

<sup>135</sup>38 CDSP no. 43 at 5 (Nov. 26, 1986).

<sup>136</sup>*Id.*

<sup>137</sup>FBIS-SOV-87-232, Dec. 3, 1987, at 80.

make a less stringent determination of the actual offense. Because their offices were probably actively involved in the investigation, the respective prosecutors dislike having a case sent back as well, and often, therefore will at least tacitly concur in this procedure. Unfortunately for the accused, the stricter description of the alleged offense allows for a greater degree of pretrial restriction, and tends to color the investigatory, trial, and appeal processes.<sup>138</sup>

To combat this problem, the Resolution on Legal Reform calls for the separation of the organs of inquiry from the direct control of the prosecutor and the influence of union republic and local Internal Affairs organs by concentrating "the main bulk of criminal cases" within the investigations apparatus of the USSR Ministry of Internal Affairs.<sup>139</sup> As previously noted, the suggestion has also been raised in the Soviet press that a court should be required to determine whether an individual should be arrested or detained, instead of a procura-

With regard to the prosecutorial function of the Military Procuracy, the Soviet Ministry of Defense has identified the areas of economic crime and "nonregulation relations" between soldiers as the two categories of offenses requiring special attention.<sup>141</sup> Economic crimes fall into two general categories: the theft of military supplies and materials; and the economic diversion of soldiers' labor from the military to either state enterprise or private use.<sup>142</sup> The Chief Military Procurator has estimated that approximately one-quarter of all offenses in the military are economic in nature.<sup>143</sup> The problem of nonregulation relations, or *dedovshchina* (bullying), is perhaps as pervasive a problem as economic crimes.<sup>144</sup> *Dedovshchina* is the almost institutionalized hazing of new recruits and younger soldiers by more senior soldiers, and apparently is much more common in regular military units than elite units.<sup>145</sup> Although the Military Procuracy and the officer corps are well aware of the problem, it has proved difficult to eradicate from the service through criminal action alone.<sup>146</sup>

At the individual disciplinary level, there appear to be three pos-

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<sup>138</sup>39 CDSP no. 22 at 9 (July 1, 1987).

<sup>139</sup>FBIS-SOV-88-128, July 5, 1988, at 140.

<sup>140</sup>39 CDSP no. 20 at 10 (June 17, 1987).

<sup>141</sup>39 CDSP no. 13 at 9 (Apr. 28, 1987).

<sup>142</sup>FBIS-SOV-88-083, Apr. 29, 1988, at 71; FBIS-SOV-87-230, Dec. 1, 1987, at 84-85.

<sup>143</sup>FBIS-SOV-88-083, Apr. 29, 1988, at 71.

<sup>144</sup>FBIS-SOV-88-070, Apr. 12, 1988, at 60.

<sup>145</sup>FBIS-SOV-88-140, July 21, 1988, at 70-71; FBIS-SOV-88-083, Apr. 29, 1988, at 70.

<sup>146</sup>*Id.*

sibly interrelated areas of concern: 1) drug abuse; 2) self-inflicted injuries;<sup>147</sup> and 3) so-called "Afghan criminality." "Afghan criminality" is apparently the tendency of soldiers who have served in Afghanistan to engage in violent criminal behavior.<sup>148</sup> Although the first two categories could clearly have other sources, the third (although its existence is denied by the Chief Military Procurator)<sup>149</sup> could easily aggravate the occurrence of drug abuse and self-inflicted injuries. Another disciplinary problem facing the Soviet military is the evasion of service by military personnel, both in the sense of unauthorized absences and through such actions as living off post in civilian housing.<sup>150</sup>

### C. THE DEFENSE BAR

On the basis of the Resolution on Legal Reform, reform efforts with regard to the defense bar are to be directed toward "enhancing the role of [the] *aduokatura* as a self-managing association for providing legal assistance to citizens" and organizations and expanding the "participation of defense attorneys in preliminary investigations and court proceedings."<sup>151</sup> Despite the fact that the lawyers' colleges are nominally self governing, the actual size of a college is in practice governed by the local Soviet of People's Deputies<sup>152</sup> and the respective union republic's Ministry of Justice.<sup>153</sup> In addition, the candidates for the Presidium are generally decided upon by the local CPSU organization before the slate is presented to the members at the general meeting.<sup>154</sup> Every Presidium meeting is attended by a representative of the USSR Ministry of Justice's *Aduokatura* Department or similar agency. Although this official is not allowed to vote on questions before the Presidium, he is allowed to express the state's opinion on the issues discussed.<sup>155</sup> One significant result of this over-

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<sup>147</sup>FBIS-SOV-87-230, Dec. 1, 1987, at 84-85. Many soldiers apparently are first acquainted with drugs such as heroin and LSD during their service in Afghanistan. FBIS-SOV-88-211, Nov. 1, 1988, at 89-90.

<sup>148</sup>FBIS-SOV-88-083, Apr. 29, 1988, at 71.

<sup>149</sup>*Id.*

<sup>150</sup>FBIS-SOV-88-070, Apr. 12, 1988, at 60; FBIS-SOV-87-230, Dec. 1, 1987, at 84-85.

<sup>151</sup>FBIS-SOV-88-128, July 5, 1988, at 140. The organization of the *aduokatura* into local unaffiliated colleges has hampered the development of the Soviet defense bar. The lack of any central organization for defense lawyers has prevented the *aduokatura* from having a meaningful voice in matters concerning the legal profession, and has made it difficult to exchange information between colleges. In November 1988, however, an official All-Union Association of Lawyers was finally created. FBIS-SOV-88-216, Nov. 8, 1988, at 64-65.

<sup>152</sup>Pipko, *supra* note 66, at 860.

<sup>153</sup>39 CDSP no. 12 at 7 (Apr. 21, 1987).

<sup>154</sup>Pipko, *supra* note 66, at 861.

<sup>155</sup>*Id.* at 863.

sight has been the restriction of the growth of lawyers' colleges such that the per capita ratio of lawyers to citizens in the USSR today approaches one to 13,000.<sup>156</sup> Increased autonomy for the lawyers' colleges could allow the use of a market approach to determine the proper size of any college, and the expansion of colleges in areas where advocates' services are in short supply.<sup>157</sup>

The current poor remuneration of lawyers is another problem that increased self management might solve. Presently, advocates are paid on the basis of a fixed schedule of fees, the rates of which are quite conservative,<sup>158</sup> and have a governmental mandated salary ceiling of 350 rubles per month.<sup>159</sup> Accepting any private remuneration above the amount set forth in the schedule of fees is grounds for disbarment.<sup>160</sup> The fee caps and salary ceilings make legal services much more affordable to the average Soviet citizen than they might be otherwise,<sup>161</sup> and reflect the fact that despite the private nature of a lawyer's employment, neither he nor Soviet society are likely to regard representation primarily as an entrepreneurial opportunity.<sup>162</sup> The remunerative scheme and the assignment system of representation, however, cause the quality of representation to suffer. Younger, less experienced counsel tend to receive a majority of the assigned cases<sup>163</sup> and must undertake many cases just to survive economically, and the fee and salary caps provide no material incentive to develop any special expertise.<sup>164</sup> One suggested solution to this problem is to remove the current ceilings on advocates' salaries,<sup>165</sup> and to allow a client to pay a greater amount for an especially qualified counsel within a set regulatory scheme that is closely supervised by the college.<sup>166</sup> The possibility also exists that advocates

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<sup>156</sup>38 CDSP no. 42 at 4 (Nov. 19, 1986). In comparison, the ratio of lawyers to citizens in the United States in 1980 was one in 418, and is expected to increase to one in 310 by 1990. B. Curran, K. Rosich, C. Carson & M. Puccetti, *The Lawyer Statistical Report 4* (1985). The total number of advocates in the Soviet Union is between 18,000 and 23,000, Pipko, *supra* note 66, at 853. Although there are approximately 100,000 jurists working as legal advisors, they of course are working for organizations, not individual defendants. Soviet Law, *supra* note 66, at 87.

<sup>157</sup>39 CDSP no. 12 at 7 (Apr. 21, 1987).

<sup>158</sup>Pipko, *supra* note 66, at 868. For example, an oral consultation with an advocate costs one ruble (\$1.30), and a criminal trial less than three days in duration costs 20 rubles per day, and 12 rubles for each subsequent day. *Id.*

<sup>159</sup>*Id.* at 870.

<sup>160</sup>*Id.*; Law on the *Aduokatura* art. 7, Basic Documents, *supra* note 14, at 205.

<sup>161</sup>In addition to being subject to fee regulation, Soviet advocates are also required to perform a substantial amount of pro bono work. *Id.* at 869.

<sup>162</sup>*Id.*

<sup>163</sup>*Id.*

<sup>164</sup>39 CDSP no. 12 at 7 (Apr. 21, 1987).

<sup>165</sup>Pipko, *supra* note 66, at 872.

<sup>166</sup>39 CDSP no. 12 at 7 (Apr. 21, 1987).

will be allowed to exercise a very extreme form of self-management, namely, practice as individuals outside of the colleges under the new law on private labor activities,<sup>167</sup> or in lawyer's cooperatives under the new law on cooperatives.<sup>168</sup>

Another aspect of self management that could improve the quality of defense bar is the application of the principle of *glasnost* to the qualifications of its members. Too often, former investigators, prosecutors, and judges whose previous job went sour are allowed into lawyers' colleges without being required to reveal those circumstances. Even when such circumstances are known, local authorities will sometimes pressure the college into accepting these individuals.<sup>169</sup>

The effectiveness of defense counsel at trial is inhibited by their almost complete exclusion from a case until the completion of the preliminary investigation. Although defense counsel have been allowed since 1970 to participate in preliminary investigations at the respective prosecutor's discretion, this permission is rarely granted.<sup>170</sup> Consequently, a defense counsel may have as little as twenty-four hours to acquaint himself with the evidence from the preliminary investigation and to submit the appropriate pleadings and petitions to the court before trial begins.<sup>171</sup> Because they also do not have the legal right to gather evidence for the accused, defense counsel are forced to rely upon evidence gathered by the Procuracy.<sup>172</sup> Many Soviet scholars and commentators, therefore, advocate extending the right to counsel back to the moment when charges are brought or an individual is arrested.<sup>173</sup> Such an expansion of the right to counsel would quite likely improve the quality of the preliminary investigation, as well as ensuring the observance of an accused's constitutional rights.<sup>174</sup>

Restrictions on the performance of defense counsel are present inside the courtroom as well. Defense counsel must not only contend with a prosecutorial bias that stems in large part from the civil law

<sup>167</sup>Pipko, *supra* note 66, at 871-72.

<sup>168</sup>Lecture by Professor Lisa Granik, *Soviet Law Semrnar*, at Georgetown University Law Center, Washington, D.C. (June 15, 1988).

<sup>169</sup>Pipko, *supra* note 66 at 863-64; 39 CDSP no. 12 at 7 (Apr. 21, 1987).

<sup>170</sup>Huskey, *supra* note 90, at 106-07.

<sup>171</sup>*Id.* at 109.

<sup>172</sup>*Id.* at 105. Although a Soviet defendant has the right to present evidence at trial, V. Terebilov, *supra* note 13, at 213, the defendant or defense counsel must petition the procurator to conduct any additional investigation required. *Id.* at 78.

<sup>173</sup>FBI-SOV-87-232, Dec. 3, 1987, at 80; 38 CDSP no. 42 at 2 (Nov. 19, 1986).

<sup>174</sup>*Id.*



concept that the police and the prosecutors are only involved in an impartial search for the truth,<sup>175</sup> but also with the pervasive perception in the Soviet legal profession that defense counsel are basically ineffectual and defend "obvious criminals."<sup>176</sup> Education as to the importance of the defense counsel's role and the concept of the presumption of innocence is seen by some Soviet legal commentators as the only way to ensure the functional equality (from a Soviet civil law point of view) of the parties before the court.<sup>177</sup>

#### IV. CONCLUSION

As illustrated by the Resolution on Legal Reform, current and contemplated reforms in the Soviet investigative and judicial systems appear to focus on two complementary approaches in order to achieve the rule of law. The first is quality control, with measures geared toward doing as many things correctly as possible at the lowest possible level of investigative and judicial procedure. The second is the enhancement of due process, by providing for mechanisms in the respective processes that will identify mistakes in the legal system and resolve them expeditiously.

This article has reviewed the functions, operations, and anticipated reforms of the Soviet military justice system. Observers may expect significant reforms in nearly all aspects of the system, including the investigation of offenses, the military tribunals, the Military Procuracy, and the defense bar. This discussion has of necessity addressed the Soviet civilian justice system because of the high degree of integration between the Soviet military and civilian justice systems. It is likely that many of the reforms adopted in the civilian legal system will have an affect upon the military justice system. There may be some differences, however, due to the military's conservative attitude toward certain aspects of *glasnost*,<sup>178</sup> and considerations of military necessity which the military justice system must recognize functionally.<sup>179</sup> For example, increasing the number of people's assessors hearing a particular case may prove difficult in the military even in peacetime field conditions. Enlarging the pretrial

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<sup>175</sup>S. Kuchеров, *supra* note 37, at 96.

<sup>176</sup>39 CDSP no. 12 at 7 (Apr. 21, 1987). The low regard for defense counsel felt by some prosecutors is shown by their efforts to turn defense counsel into witnesses against their clients in knowing derogation of the attorney-client relationship. *Id.*

<sup>177</sup>*Id.* The recent creation of the USSR Jurists Union, a national bar organization, should greatly assist in breaking down professional prejudices among Soviet legal practitioners. FBIS-SOV-88-230, Nov. 30, 1988, at 90.

<sup>178</sup>Gross, *supra* note 122, at 69-80.

<sup>179</sup>Sims, *supra* note 11, at 387-89.

role of defense counsel in the Soviet military justice system may be difficult as well, unless the military is prepared to devote resources toward providing for the greater availability of advocates, perhaps even in the form of state-employed *advokatura*.

The actual course of legal reform in the USSR is presently undetermined, as is the course of *perestroika* in general. Reform efforts have exposed serious deficiencies in the Soviet legal system, however, and both Soviet officials and legal commentators have recognized the need to effectively deal with these problems. Significant restructuring of the Soviet legal system is therefore likely, and this may warrant close watching by Western observers as an indication of *perestroika's* overall progress.

# ARTICLE 31(b): WHO SHOULD BE REQUIRED TO GIVE WARNINGS?

by CPT Manuel E.F. Supervielle

## I. INTRODUCTION

No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him . . . .<sup>1</sup>

Thus begins article 31(b) of the Uniform Code of Military Justice. The words are not difficult to understand. The grammatical construction is not complex. Why then has there been so much debate and difference of opinion over this simple phrase? Who is supposed to be the subject of the command in the phrase? Who is or should be required to warn under article 31(b)?

Military judges at all levels have wrestled with this issue since May 31, 1951, the effective date of article 31. Even the Court of Military Appeals has found it difficult to reach a consensus on this question and to maintain any consensus over time. In fact, since 1953 when the Court of Military Appeals first faced this issue in *United States v. Wilson*,<sup>2</sup> the judges on the court have devised four different tests to answer the question of who is required to warn under article 31(b).<sup>3</sup> Some tests endured longer than others.

The test currently in force is the *Duga* "officiality plus perception" test.<sup>4</sup> As recently as 1987, however, Chief Judge Everett expressed reservations about the continued validity of the *Duga* test.<sup>5</sup> The

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<sup>1</sup>Uniform Code of Military Justice art. 31(b), 10 U.S.C. § 831(b) (1982) [hereinafter UCMJ].

<sup>2</sup>8 C.M.R. 48 (C.M.A. 1953).

<sup>3</sup>See *infra* notes 158-212 and accompanying text.

<sup>4</sup>*United States v. Duga*, 10 M.J. 206 (C.M.A. 1981). The *Duga* test set out two conditions before Article 31(b) warnings are required: 1) the questioner must be acting in an official capacity; and 2) the suspect or accused must perceive the official nature of the questioning.

<sup>5</sup>*United States v. Jones*, 24 M.J. 367, 369 (C.M.A. 1987) (Everett, C.J., concurring). Even though the *Duga* test has been used by the Court of Military Appeals since 1981, Chief Judge Everett said that a persuasive argument could be made against the first

analysis to Military Rule of Evidence 305(c) best summarizes the current confusion in this area of the law. It states in pertinent part that "Rule 305(c) basically requires that those persons who are required by statute to give article 31(b) warnings give such warnings. The Rule refrains from specifying who must give such warnings in view of the unsettled nature of the case law in the area."<sup>6</sup>

The "unsettled nature of the case law in this area" leaves a great deal of maneuvering room for defense counsel to argue for the exclusion of an unwarned confession. Trial counsel must be familiar with the reasoning and policy objectives of the *Duga* test, as well as other tests that may be advanced by a resourceful defense counsel, to persuasively argue for admission of unwarned confessions.

To properly answer the question of who must warn under article 31(b), it is first necessary to understand how subsection (b) relates to the other sections of article 31 and to the military rules of evidence. Subsection (b) is only one piece of a large, intricate blanket of protection that has been sewn together over centuries, using material from different sources. The blanket protects persons suspected or accused of a crime in the military, and at the same time it protects the judicial process. Focusing exclusively on the issue of who must warn without considering the other facets of article 31 would be like looking only at one section of the large blanket. This kind of examination would not yield an appreciation of how the entire blanket protects individuals and the judicial process. Thus, to fully appreciate the policy objectives underlying the different tests devised by the Court of Military Appeals for answering the central question of this article, an overview of the law is necessary. Only from such a vantage point can the complexity and purpose of the law be appreciated.

To provide the proper vantage point for analysis, part II of this article will examine the historical origins and development of the right against self-incrimination, the common law rule of confessions, and the due process voluntariness doctrine. Part III will explore in detail the development of the same legal principles in the United States Army, and by 1950, all of the armed forces.<sup>7</sup> Part IV will dis-

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condition of the *Duga* test, but that "after further reflection, [he] believe[d] [*Duga*] to have been correctly decided." *Id.*

<sup>6</sup>Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 305(c) analysis [hereinafter Mil. R. Evid.].

<sup>7</sup>The Army experienced continuous legislative reforms in the law of confessions and right against self-incrimination from 1775 to 1951. By contrast, the Navy did not. The Navy's Articles for the Government of the Navy were copied in 1775 from the British Articles for the Government of the Royal Navy of 1649, as modified in 1749. The American Articles for the Government of the Navy "were slightly revised in 1800, and a few

cuss the four tests devised by the judges of the Court of Military Appeals to answer the central question of this article. Specifically, part IV will examine the rationale and policy objectives underlying each test, as well as the strengths and weaknesses of each test. Finally, the article will address the question of who should warn under article 31(b).

## 11. DEVELOPMENT OF THE LAW OF CONFESSIONS IN ANGLO-AMERICAN JURISPRUDENCE TO THE YEAR 1951<sup>8</sup>

The law of confessions<sup>9</sup> consists of several rules, implementing separate policy objectives, used to decide the admissibility of an accused person's out-of-court confession. This part of the article will summarize the historical development of the right against self-incrimination,<sup>10</sup> the common law rule of confessions, and the fourteenth amendment due process voluntariness doctrine. Together, these legal principles form the foundation of the law of confessions.

The right against self-incrimination and the common law rule of confessions originated during different centuries and for different reasons. The right against self-incrimination originated during the sixteenth century in England. One of its primary objectives was to shield the accused person's thought process from governmental intrusion seeking incriminating information for use at a criminal proceeding." The common law rule of confessions originated in En-

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new wrinkles were added thereafter, but these rules stood virtually intact until the 1862 codification. . . . [T]he Articles for the Government of the Navy (AGN) as they stood in 1950 were essentially unchanged from 1862." William T. Generous, Jr., *Swords and Scales* 10-11 (1973). This article focuses on the development of the right against self-incrimination and the common law rule of confessions prior to the UCMJ as it occurred in the Army.

"This discussion ends in 1951 as does the discussion in part III, *infra*, because the objective of these two parts is to provide insight into the state of the law at the time the Court of Military Appeals first decided the issue of who must warn under article 31(b).

"This article uses the term "law of confessions" to mean the general body of law that applies to the admission of a confession into evidence. Thus, various legal principles derived from different sources of authority, taken together form the "law of confessions." The specific legal principles discussed in this article are the common law rule of confessions, the fourteenth amendment's due process voluntariness standard, and the fifth amendment's right against self-incrimination.

"This legal concept is interchangeably referred to as a "right" and as a "privilege." The term "right" implies something that belongs to the holder, whereas the term "privilege" implies something that the holder possesses at the discretion of someone else. For the sake of clarity, this concept will be consistently referred to throughout the article as the "right" against self-incrimination.

<sup>11</sup>8 J. Wigmore, *Evidence in Trials at Common Law*, § 2251, at 295-318 (McNaughton rev. ed. 1961) [hereinafter 8 Wigmore]. At least a dozen different policy objectives have been advanced as justification for the right against self-incrimination. One of the

gland during the eighteenth century. Its objective was to exclude untrustworthy out-of-court confessions." The due process clause of the fourteenth amendment to the United States Constitution was incorporated into the American law of confessions in the first half of 1900's. Its objective was to insure fairness in the criminal justice process.

Article 31 brought these different legal principles together for the first time. To fully understand article 31, one must first understand the historical foundations for the creation and development of the principles that make up article 31. In the words of Justice Frankfurter, "The . . . [right] against self-incrimination is a specific provision of which it is peculiarly true that a page of history is worth a volume of logic."<sup>13</sup>

### ***A. THE HISTORICAL DEVELOPMENT OF THE RIGHT AGAINST SELF-INCRIMINATION***

Fifteenth-century England had three different systems for the administration of criminal law: the common law system, the ecclesiastical legal system, and the Star Chamber legal system.<sup>14</sup> The common law system was accusatorial in nature; that is, the community accused an alleged wrongdoer of a crime, and then the state accused him by means of a grand jury indictment. Trial procedure consisted of in-court examination of witnesses and of the defendant. The types of crimes prosecuted were such offenses as larceny, robbery, assault, and other "common" offenses.<sup>15</sup>

The ecclesiastical courts and the Star Chamber proceeded in an inquisitorial manner. The ecclesiastical courts tried to expose religious heretics, and the Star Chamber tried to uncover persons who

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most persuasive is that it "contributed toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." *Id.* at 317.

<sup>123</sup> J. Wigmore, *Evidence in Trials at Common Law*, § 822, at 329-336 (Chadbourn rev. 1970) [hereinafter 3 Wigmore]. The policy objective of the common law rule of confessions was this: "The principle . . . upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy*." *Id.* at 330 (emphasis added). Throughout this article, the term "common law rule of confessions" refers to this rule based exclusively on the narrow policy objective of admitting only "trustworthy evidence."

<sup>13</sup> *Ullmann v. United States*, 350 U.S. 442, 438 (1956) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)), *quoted in* S. Saltzburg, *American Criminal Procedure* 366 (1980).

<sup>148</sup> Wigmore, *supra* note 11, § 2250, at 267-95.

<sup>15</sup> *Id.*

held seditious beliefs.<sup>16</sup> In these courts, an official administered an oath *ex officio*<sup>17</sup> to the defendant and ordered him to “tell the truth to the full extent of his knowledge as to all things he would be questioned about, without [being advised] . . . whether or not he was accused . . . or of the nature of the questions before administration of the oath.””

The oath *ex officio* compelled the defendant to incriminate himself if he held opinions that were offensive to the crown or to the church. The compulsion resulted from the “choices” given to the defendant: he could refuse the order to talk, and be held in contempt of court; he could answer the questions truthfully, and incriminate himself; or he could lie under oath, and commit perjury.<sup>19</sup> This “cruel trilemma” left the defendant no real choice. The compulsion was legal in the sense that the order to testify came from a court.

During the next two centuries, the basic unfairness of the procedures employed by the Star Chamber and ecclesiastical courts led to growing opposition to the use of the oath *ex officio*.<sup>20</sup> By 1604 the first Parliament of James I presented the king a petition asking that the oath *ex officio* “whereby men are forced to accuse themselves, be more sparingly used.”<sup>21</sup> Opposition to the use of the oath *ex officio* in combination with an order to testify intensified. By 1641 Parliament abolished the Star Chamber and eliminated the criminal jurisdiction of the ecclesiastical courts. The use of the oath *ex officio* was abolished in the same year.<sup>22</sup> These reforms, however important, did not establish the right against self-incrimination.

Defendants were usually not examined upon oath by the common law courts, but they were questioned freely about criminal activities and pressed by the judges to answer. Protests against such questioning were not raised until after the oath *ex officio* had been condemned because of its association with the [Star Chamber and ecclesiastical courts]. During the mid-seventeenth century, several cases recorded the

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<sup>16</sup>*Id.*

<sup>17</sup>The oath *ex officio* was so named because it was administered by an official of the court by virtue and authority of his office. Congressional Research Service, Library of Congress, The Constitution of the United States of America, S. Doc. No. 82, 92d Cong., 2d Sess. 1106 (1972) [hereinafter Constitution of the United States].

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 316.

“American Bar Foundation, Sources of Our Liberties 129-32 (R. Perry ed. 1959) [hereinafter Liberties].

<sup>21</sup>*Id.* at 132.

<sup>22</sup>*Id.* at 428.

growing opposition to the practice of the common law courts. . . . The old habit of questioning the accused [during common law criminal trials] did not completely die out, however, until the beginning of the eighteenth century.<sup>23</sup>

An important new legal principle known as the right against self-incrimination had taken root in England and in America. Following the American Revolutionary War, six states included the right against self-incrimination in their constitutions.<sup>24</sup> To ensure that the newly-formed Federal Government could not commit political and religious persecutions through the judicial process as in England, the proposed fifth amendment to the Federal Constitution contained a clause prohibiting the Federal Government from compelling any person to be a witness against himself in any criminal case.<sup>25</sup>

The requisite number of states ratified the Bill of Rights containing the fifth amendment's right against self-incrimination in 1791.<sup>26</sup> During the first century of its existence, however, the Supreme Court limited the application of the fifth amendment to federal criminal trial proceedings.<sup>27</sup> Thus, state criminal proceedings were not affected by the fifth amendment right against Self-incrimination. Furthermore, even in federal criminal proceedings, the common law rule of confessions exclusively governed the admissibility of extra-judicial, or out-of-court confessions.<sup>28</sup> Consequently, the right against self-incrimination protected only witnesses, including the accused if he testified, during a federal criminal proceeding. The trial judge implemented the right against self-incrimination by informing the witness of his right to refuse to answer a question. The judge, however, cautioned the witness that he could refuse to answer the question only if the response was incriminating or if it might lead to incriminating information.<sup>29</sup>

Confessions at that time were dealt with in both state and federal courts under the common law rule.<sup>30</sup> The Supreme Court specifically

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<sup>23</sup>*Id.* at 134, 136.

<sup>24</sup>Constitution of the United States. *supra* note 17, at 1106. The six states were Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia.

<sup>25</sup>U.S. Const. amend. V. The fifth amendment states in pertinent part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." *Id.*

<sup>26</sup>Liberties, *supra* note 20, at 418.

<sup>27</sup>*See infra* notes 32-37, 59-60 and accompanying text.

<sup>28</sup>*See infra* note 31 and accompanying text. Throughout the remainder of this article, the term "confession," unless otherwise indicated, refers to out-of-court, pretrial incriminating statements by a person suspected or accused of a crime. The term "confession" does not refer to a judicial confession or to a plea of guilty.

<sup>29</sup>8 Wigmore, *supra* note 11.9 2269, at 412-13.

<sup>30</sup>*See infra* notes 47-56 and accompanying text.



adopted the common law rule in 1884.<sup>31</sup> In 1897, however, the Supreme Court decided *Bram v. United States*.<sup>32</sup> *Bram* announced a radical departure from previous precedent when it declared that

[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."<sup>33</sup>

*Bram* interjected the fifth amendment's right against self-incrimination into a totally new area: the body of law concerned with the admissibility of confessions. Although this was a novel legal concept, its practical significance was limited by two circumstances. First, *Bram* was a federal criminal case and thus had no impact on state confession law.<sup>34</sup> Second, "while the language [of *Bram*] was never expressly disavowed in subsequent cases arising in the federal courts the [Supreme] Court seems nevertheless to have proceeded along due process standards rather than the self-incrimination analysis."<sup>35</sup> The Supreme Court de-emphasized *Bram*, citing it with approval in only a few cases.<sup>36</sup> *Bram* faded in significance until 1966, when the Supreme Court cited it as supporting authority for its landmark decision in *Miranda v. Arizona*.<sup>37</sup>

## ***B. THE HISTORICAL DEVELOPMENT OF THE COMMON LAW RULE OF CONFESSIONS AND THE DUE PROCESS VOLUNTARYNESS DOCTRINE***

As the right against self-incrimination developed, the law of confessions developed on a parallel course, and sometimes these areas crossed paths. Professor John H. Wigmore identified four stages in the development of the law of confessions.<sup>38</sup> These stages will be used as the framework for analysis in this section.<sup>39</sup>

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<sup>31</sup>See *Hopt v. Utah*, 110 U.S. 574 (1884).

<sup>32</sup>168 U.S. 532 (1897).

<sup>33</sup>*Id.* at 542.

<sup>34</sup>*Bram* was a murder case which arose on an American ship on the high seas, and thus was adjudicated in the federal criminal justice system.

<sup>35</sup>*Constitution of the United States*, *supra* note 17, at 1122.

<sup>36</sup>*Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347 (1963); *Ziang Sun Wan v. United States*, 266 U.S. 1, 14-15 (1924); *Burdequ v. McDowell*, 256 U.S. 465, 475 (1921); *Powers v. United States*, 223 U.S. 303, 313 (1912).

<sup>37</sup>384 U.S. 436, 461-62 (1966).

<sup>38</sup>3 Wigmore, *supra* note 12, § 817, at 291-92.

<sup>39</sup>Professor Wigmore's views were important to the development of military evidence

The first stage in the development of the law of confessions occurred during the sixteenth and seventeenth centuries. No rule or practice existed for excluding confessions from admission at a criminal trial. Judges admitted all statements made by a defendant. Torture, threats, promises, and other means of coercion were routinely used to obtain a confession for use at trial against the defendant.<sup>40</sup>

The second stage in the development of the law of confessions began in the second half of the 1700's.<sup>41</sup> The practice of criminal law in the common law courts improved gradually with the passage of time and a new rule concerning the use of confessions emerged. Judges recognized that a confession, "as an extrajudicial statement, . . . would ordinarily be obnoxious to the hearsay [exclusionary] rule."<sup>42</sup> Therefore, the confession should not be admitted into evidence unless there existed independent indicia of trustworthiness. If there was such indicia, the confession could be excepted from the exclusionary provision of the hearsay rule. Judges concluded that a confession was in effect an admission against interest by a party to the proceedings, one of the recognized hearsay exceptions. Thus, the admission against interest by the defendant provided the necessary indicia of trustworthiness, allowing the confession to escape the exclusionary provision of the hearsay rule.<sup>43</sup> This new rule became known as the common law rule of confessions. It is important not to confuse this rule with the broader and more general law of confessions. At this point in history, the common law rule of confessions was the exclusive component of what would grow to be the law of confessions.

What if torture, threats, or promises negated the necessary indicia of trustworthiness? The new common law rule of confessions excluded the confession if such means had been used to obtain it. The judges reasoned that the use of coercion, threats, and promises discredited the confession.<sup>44</sup> Judges wanted to admit only reliable and trustworthy confessions. The rule was intended to protect the fact-finding process. Any benefit to the defendant resulting from the exclusion of his confession was incidental.

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law. Professor Wigmore served on active duty with the United States Army from 1917 to 1920. He wrote the chapter on evidence in the 1917 Manual for Courts-Martial and later expanded it in the 1921 Manual for Courts-Martial. *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, at 119 (1975).

<sup>40</sup>3 Wigmore, *supra* note 12, § 818, at 294. "[U]p to the middle of the 1600's at least, the use of torture to extract confessions was common, and confessions so obtained were employed evidentially without scruple." *Id.*

<sup>41</sup>*Id.* § 819, at 296-97.

<sup>42</sup>*Id.* § 816, at 290-91.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* § 819, at 297.

During the initial period of the common law rule's development, very few confessions were excluded.<sup>45</sup> The defendant had the near impossible burden of showing that he was subjected to serious coercion, resulting in an untrustworthy confession. "At this stage, then, the doctrine . . . [was] a perfectly rationale one. Confessions apparently untrustworthy as affirmation of guilt are excluded."<sup>46</sup>

The third stage of the law of confessions occurred from the beginning of the 1800's to the latter part of the same century.<sup>47</sup> The attitude of the judges gradually turned 180 degrees and reached a point where confessions were very difficult to admit into evidence. Judges held a very strong prejudice against the use of confessions at trial. Professor Wigmore gives three reasons for the shift in opinion by nineteenth-century judges.<sup>48</sup>

First, most criminal defendants were from the lowest echelons of society. Defendants were usually poor people with little or no education. They had been conditioned generation after generation to be subservient to social superiors and to government officials. Judges believed these types of defendants were very susceptible to undue influence from persons in authority. Thus the defendant might confess falsely if he felt pressured to do so.<sup>49</sup>

The second reason for the prejudice against admissibility of confessions was that evidentiary issues often had to be decided by isolated judges without the benefit of consultation with colleagues. "The result was that judges commonly preferred to eliminate the questionable evidence altogether, [including confessions] . . . and to solve all questions that were even arguable . . . in favor of the accused."<sup>50</sup>

The third reason was that judges believed the rules of procedure at common law were fundamentally unfair to the defendant. Specifically, the defendant could not testify under oath at his own trial because he was considered an incompetent witness.<sup>51</sup> The common law considered the defendant incompetent because he was an interested party in the proceedings, and as such, he might have a propensity to testify falsely. Many judges refused to admit the confession as a way to balance the scales of justice between the individual and the government. Fairness required that if the defendant could not testify, then his confession should not be admitted.

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<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* § 820, at 297.

<sup>48</sup>*Id.* § 820a, at 298-301.

<sup>49</sup>*Id.* at 299.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at 300.

The three reasons for nineteenth-century judges' prejudice against confessions were legitimate. The problem was that the courts continued to articulate the traditional common law rule of testing confessions for trustworthiness as the legal foundation for their decisions, when in fact their decisions were based on the totally different policy concerns mentioned above. "Hence an irreconcilable conflict between the normal and accepted theory or principle for excluding confessions, and the abnormal use practically made of it for ulterior purposes, [developed]"<sup>52</sup> Many decisions seemed absurd unless the ulterior motives behind them were understood. Judges declared confessions to be untrustworthy upon the slightest excuse, no matter how preposterous the rationale.<sup>53</sup>

By the latter part of the 1800's, the fourth stage in the development of the law of confessions began.<sup>54</sup> Advances in criminal procedures, such as granting the defendant the right to testify, reduced the significance of the ulterior justifications for excluding confessions. The courts were returning to the original purpose of the common law rule of confessions: the concern with trustworthiness. The law of confessions turned another 180 degrees, back to where it was at the beginning of the 1800's.<sup>55</sup>

In 1884 the Supreme Court adopted the traditional common law rule of confessions in *Hopt v. Utah*.<sup>56</sup> This was the Court's first decision concerning the admission of a confession. It declared that

the presumption upon which weight is given to such evidence . . . ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.<sup>57</sup>

The Court excluded the confession on the traditional policy that under certain circumstances, involuntarily obtained confessions were nothing more than untrustworthy hearsay.

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<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 300-01.

<sup>54</sup>*Id.* § 820d, at 306-08.

<sup>55</sup>*Id.* § 822, at 329-30.

<sup>56</sup>110 U.S. 574 (1884).

<sup>57</sup>*Id.* at 585.

The exclusive use of this policy for determining the admissibility of confessions was challenged in 1897 when the Supreme Court decided *Brum u. United States*.<sup>58</sup> There, for the first time, the Court interjected fifth amendment right against self-incrimination concerns into the equation for testing the admissibility of confessions. *Bram*, however, did not have a significant impact on the federal law of confessions, and it had no impact on the law of confessions in state jurisdictions.<sup>59</sup>

Legal scholars voiced other challenges to the exclusive use of the traditional common law rule during the first half of the 1900's.<sup>60</sup> Professor Charles T. McCormick recognized the validity of the traditional common law confessions rule, but he also saw the need for excluding confessions to support the policy that law enforcement officials should treat suspected and accused persons in a humane and dignified manner. He believed the use of torture, intimidation, and other "third degree" police tactics corrupted the judicial process and was fundamentally unfair to the defendant. Professor McCormick argued that the trustworthiness of a confession should not be the only issue in determining admissibility.<sup>61</sup>

In 1936 the Supreme Court adopted the policy of fundamental fairness as part of the law of confessions in *Brown v. Mississippi*.<sup>62</sup> This was the Court's first case dealing with the admissibility of a confession arising from a state court. In *Brown*, brutal torture was used to obtain the confession admitted in evidence against the defendant. After the murder of a white farmer in rural Mississippi, police officers suspected a poor black man named Brown as the killer. Police officers arrested Brown and pretended to lynch him twice in an attempt to induce a confession, but Brown refused to confess. He was released, but two days later he was rearrested and whipped with ropes and studded belts until he confessed to the murder.<sup>63</sup>

The Supreme Court drew a distinction between the right against self-incrimination and the right to due process. The Court found only the latter to have been violated and concluded that

the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. . . .

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<sup>58</sup>168 U.S. 532 (1897).

<sup>59</sup>See *supra* notes 34-37 and accompanying text.

<sup>60</sup>3 Wigmore, *supra*, note 12, § 822, at 329-36.

<sup>61</sup>McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Tex. L. Rev. 447 (1938).

<sup>62</sup>297 U.S. 278 (1936).

<sup>63</sup>*Id.* at 281-82.

The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.

It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of this petitioner, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of *due process*.<sup>64</sup>

The Supreme Court did not apply the *Bram* rule for two reasons. First, the *Bram* rule applied only to federal trials, and *Brown* was a state trial. Second, despite the *Bram* rule, the Supreme Court in 1936 viewed the right against self-incrimination as a protection available only during the trial itself and not before that time.

The significance of *Brown* was that it created a fourteenth amendment due process protection and that it applied the protection to state criminal proceedings. Following *Brown*, the Supreme Court, on occasion, used the due process clause of the fourteenth amendment to exclude confessions obtained by methods that were fundamentally unfair to the defendant. For example, in 1940 *Chambers v. Florida*<sup>65</sup> recognized that mental coercion, not just physical torture, could be so extreme as to violate due process. There, the police arrested the accused without a warrant, held him incommunicado, and subjected him to continuous interrogation for five days.

In 1941 *Lisenba v. California*<sup>66</sup> clearly distinguished the traditional common law rule of confessions and its objective of excluding only unreliable confessions from the due process requirement of the fourteenth amendment and its objective of ensuring fundamental fairness.

The aim of the [common law] rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. . . . The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false.<sup>67</sup>

*Brown, Chambers, Lisenba, and other important decisions*<sup>68</sup> relied

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<sup>64</sup>*Id.* at 285, 286 (emphasis added).

<sup>65</sup>309 U.S. 227 (1940).

<sup>66</sup>314 U.S. 219 (1941).

<sup>67</sup>*Id.* at 236 (emphasis added).

<sup>68</sup>*Haynes v. Washington*, 373 U.S. 503 (1963); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Watts v. Indiana*, 338 U.S. 49 (1949); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

primarily on the fourteenth amendment due process voluntariness standard rather than the traditional common law trustworthiness rule of confessions. "Over the next several years [after *Lisenba*], while the Justices continued to use the terminology of voluntariness, the Court accepted at different times both the concepts of *trustworthiness* and of *constitutional fairness*."<sup>69</sup> By 1951, when the Uniform Code of Military Justice became effective, the American law of confessions emphasized both of these policy reasons.<sup>70</sup>

On the narrower topic of rights warnings, state and federal law differed in one major way in 1951. In state criminal cases, warnings by law enforcement officers concerning the right against self-incrimination played a small role in the law. Warnings were a factor, among many others, to be considered under the totality of the circumstances as part of the due process voluntariness doctrine.<sup>71</sup> The Supreme Court did not require the application of the fifth amendment's right against self-incrimination protection to state proceedings.

In federal criminal cases, Congress required prompt arraignment before a federal magistrate for persons arrested by federal law enforcement officials.<sup>72</sup> Under Federal Rule of Criminal Procedure 5(b), the magistrate had a duty to warn the suspect of the charge against him, that he had the right to remain silent, that if he chose to say something it could be used against him at trial, and that he had the right to the assistance of a lawyer.<sup>73</sup>

In order to make this rule effective, the Supreme Court decided in *McNabb v. United States*<sup>74</sup> that if the government unnecessarily delayed the arraignment of the accused, a resulting confession would be inadmissible. Lower federal courts initially interpreted the *McNabb* decision as part of the due process voluntariness doctrine and accordingly treated an unnecessary delay in arraignment as a factor to be

<sup>69</sup>Constitution of the United States, *supra* note 24, at 1130 (emphasis added).

<sup>70</sup>In *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961), ten years after enactment of the UCMJ, the Supreme Court declared:

To be sure, confessions cruelly extorted may be and may have been, to an uncertain extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.

<sup>71</sup>See *Harris v. South Carolina*, 338 U.S. 68 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Watts v. Indiana*, 338 U.S. 49 (1949).

<sup>72</sup>Fed. R. Crim. P. 5(a) (1946).

<sup>73</sup>Fed. R. Crim. P. 5(b) (1946). The magistrate also had to set the terms for bail. *Id.*

<sup>74</sup>318 U.S. 332 (1943).

considered under the totality of the circumstances in determining the voluntariness of the decision to confess.<sup>75</sup> The Supreme Court expressly rejected this interpretation just five years after *McNabb* in *Upshaw v. United States*,<sup>76</sup> when it proclaimed that if the government unnecessarily delayed the accused's arraignment, the confession was per se inadmissible. The Court reasoned that Congress granted the accused a right to be promptly warned of his constitutional right against self-incrimination; therefore the voluntariness of the confession was not a relevant matter in this inquiry. The totality of the circumstances test was not triggered unless the government could first show that it had arraigned the accused promptly. Consequently, federal law enforcement officials had to overcome the *McNabb* prompt arraignment hurdle, the due process voluntariness hurdle,<sup>77</sup> and the traditional common law trustworthiness hurdle to get a confession admitted into evidence.

Since the *McNabb* rule was a means to enforce the Federal Rules of Criminal Procedure, it did not apply to the states. Furthermore, since the Court promulgated this rule pursuant to its supervisory power over lower article III federal courts, it did not apply to courts-martial, because the Supreme Court did not have any supervisory power over military tribunals.<sup>78</sup>

In summary, by 1951 the American civilian law of confessions rested primarily on the due process voluntariness doctrine. The traditional common law rule of confessions was still a part of the larger law of confessions, but it was no longer the only consideration. The right against self-incrimination was applicable only in the courtroom, and only to the extent the trial judge believed a particular question might evoke an incriminating response. Outside the courtroom, federal law enforcement officials had to arraign the accused promptly, at which time the accused was warned of his right against self-incrimination, but state law enforcement officials had no duty to arraign promptly or to provide warnings.

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<sup>75</sup>Constitution of the United States, *supra* note 24, at 1125 n. 14.

<sup>76</sup>335 U.S. 410 (1948).

<sup>77</sup>Federal law enforcement officials had to follow the due process requirements of the fifth amendment, rather than the fourteenth amendment due process clause, which applied to state law enforcement officials.

<sup>78</sup>*See, e.g., Burns v. Wilson*, 346 U.S. 137, 145 n. 12 (1953).



## 111. DEVELOPMENT OF THE RIGHT AGAINST SELF-INCRIMINATION AND THE DUTY TO WARN IN THE MILITARY TO THE YEAR 1951

Part III reviews the development of the right against self-incrimination in the United States Army, and by 1951 all the armed forces, with a focus on the creation and evolution of the warning requirement. The time period covered is from the first American Articles of War of 1775 to the Uniform Code of Military Justice of 1951. Five stages in the development of the right against self-incrimination are important in the discussion: 1) pre-recognition; 2) recognition; 3) early development; 4) independent respect; and 5) expansion.

### A. PRE-RECOGNITION OF THE RIGHT: 1775 TO 1806

The Articles of War of 1775 were the first enactment of American military law.<sup>79</sup> They were copied from the British Articles of War in effect in 1775, which in turn were based on the continental European civil law.<sup>80</sup> Interestingly, the Anglo common law did not have a strong influence on British military law. As a result,

our [American] military law has always borne many striking resemblances to the civil law, as contrasted with the Anglo-American common-law. Over the years, many rules and practices [were] brought over from the common law, such as the presumption of innocence, the *privilege against self-incrimination*, and the common-law rules of evidence.<sup>81</sup>

The 1775 Articles of War contained no reference to the right against self-incrimination and no provision for the use of common law rules of evidence. The 1775 Articles truly reflected the mark of the civil law inquisitorial legal system. In 1776 the Continental Congress revised the Articles of War and expressly rejected the right against self-incrimination. Section XIV, article 6 of the 1776 Articles of War authorized compulsory testimony, declaring that “[all persons called to give evidence, in any cause, before a court-martial, who shall re-

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<sup>79</sup>W. Winthrop, *Military Law and Precedents* 953-60 (2d ed. 1920).

<sup>80</sup>*Id.* at 931-946.

<sup>81</sup>96 Cong. Rec. Pt. 1, 1353 (1950), *reprinted in* Dep’t of Navy, Congressional Floor Debate on the Uniform Code of Military Justice, Pub. No. 9ND-P-1978, at 189 (emphasis added).

fuse to give evidence, shall be punished for such refusal at the discretion of such court-martial."<sup>82</sup>

The accused ordered to testify before a court-martial was truly compelled to incriminate himself if he was in fact guilty. The combination of an oath and a lawful order to testify placed the accused in the same "cruel trilemma" that Englishmen faced prior to the abolition of the oath *ex officio* in 1641. Thus, the first two enactments of law for the discipline of the American army created an inquisitorial criminal system of law.

### ***B. RECOGNITION OF THE RIGHT: 1806***

Article 69 of the 1806 revision of the Articles of War recognized the right against self-incrimination for the first time in American military law.<sup>83</sup> It stated in pertinent part that

[t]he judge advocate or some person deputed by him, . . . shall prosecute in the name of the United States of America; but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or *any question to the prisoner, the answer to which might tend to incriminate himself*.<sup>84</sup>

The authorization for compulsory testimony contained in the 1776 Articles was eliminated. In its place stood the first statutory recognition of the right against self-incrimination in the American military. The prosecuting judge advocate was responsible for ensuring respect for the right against self-incrimination held by the prisoner or by the accused.<sup>85</sup> Witnesses other than the accused did not enjoy the protection of the right, because the judge advocate had to object to incriminating questions put only to the accused. The judge advocate acted as "counsel for the prisoner," not as counsel for all witnesses.<sup>86</sup> Thus, the 1806 Articles of War selectively incorporated one of the most fundamental rights of Anglo-American jurisprudence. It was recognized, however, only at the court-martial. There was no statutory recognition of the right at preliminary hearings or investigations.<sup>87</sup>

<sup>82</sup>W. Winthrop, *supra* note 79, at 968.

<sup>83</sup>*Id.* at 982.

<sup>84</sup>*Id.* (emphasis added).

<sup>85</sup>Winthrop uses the term "prisoner" synonymously with the term "accused." *Id.* at 196-99.

<sup>86</sup>*Id.* at 982.

<sup>87</sup>*Id.* at 976-85.

## ***C. EARLY DEVELOPMENT OF THE RIGHT: 1806 TO 1916***

### *1. Act of 1878*

The Act of March 16, 1878,<sup>88</sup> granted an accused the right to testify at his court-martial if he chose to, but he could not be ordered to testify. This statutory change reflected the trend in the common law rules of evidence of admitting more evidence by relaxing the competency requirements. The statute reinforced the right against self-incrimination by declaring that the accused's "failure to make such request [to testify] shall not create any presumption against him."<sup>89</sup> This provision strengthening the right against self-incrimination reflected the position taken by the Supreme Court in *Wilson v. United States*.<sup>90</sup> In *Wilson* the Supreme Court established the rule that the government cannot adversely comment on the accused's refusal to testify at trial.<sup>91</sup> The accused's refusal to testify was based on the fifth amendment right against self-incrimination, and if the government was permitted to adversely comment on the accused's invocation of his right, the constitutional protection would be effectively nullified.

### *2. Instructions for Courts-Martial, 1891*

The 1891 Instructions for Courts-Martial<sup>92</sup> provided the first comprehensive procedural guide for the conduct of courts-martial. The Instructions reinforced the right against self-incrimination by reiterating the statutory duty of the judge advocate to object to incriminating questions put to the accused.<sup>93</sup>

The Instructions, however, went further than the statutory minimum requirement. In describing additional duties of the judge advocate, the Instructions required him to observe a limited portion of the common law rule of confessions. The Instructions stated that the judge advocate

may ask a prisoner how he intends to plead; but, when the accused is an enlisted man, he should, in no case, try to *induce* him to plead guilty, or leave him to infer that, if he does

<sup>88</sup>Act of March 16, 1878, ch. 37, 20 Stat. 30.

<sup>89</sup>*Id.*

<sup>90</sup>149 U.S. 60, 65 (1893).

<sup>91</sup>*Id.* at 65. The Supreme Court said that to allow the prosecution to comment on the accused's decision to invoke his right against self-incrimination disregarded the accused's presumption of innocence.

<sup>92</sup>A. Murray, Instructions for Courts-Martial (2d ed. 1891).

<sup>93</sup>*Id.* at 9.

so, his punishment will be lighter. When, however, such a plea is *voluntarily and intelligently* made, the judge advocate should properly advise the prisoner of his right to offer evidence in explanation of his offense.<sup>94</sup>

The plea of guilty was a judicial confession. The Instructions admonished the judge advocate not to say or do anything which might make the enlisted accused think he would receive a benefit from pleading guilty.<sup>95</sup> Application of both the constitutional right against self-incrimination and the limited portion of the common law rule of confessions, however, was again confined to the courtroom.<sup>96</sup>

The Instructions also required the judicial confession be made voluntarily and intelligently. This requirement demonstrated an early concern in the Army for ensuring the accused not only pleaded guilty of his own free will, but also a concern for ensuring the accused understood the consequences of his actions.

### 3. *Act of 1901*

The Act of March 2, 1901,<sup>97</sup> contained the next specific statutory reference to the right against self-incrimination in the Army. This statute allowed the Army to compel "attendance of civilian witnesses at courts-martial by certifying the witness' refusal to appear or testify to a federal district court for trial of the issue."<sup>98</sup> To protect civilian witnesses from possible abuse by courts-martial, the act included the following proviso: "no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him."<sup>99</sup> Civilian witnesses were thus assured of the right against self-incrimination at courts-martial. They were also given a nonconstitutionally based protection against degrading questions.<sup>100</sup>

The fact that this statute pertained only to civilian witnesses cre-

<sup>94</sup>*Id.* at 10 (emphasis added).

<sup>95</sup>The Instructions did not contain a similar admonition concerning officer accuseds.

<sup>96</sup>The common law rule of confessions was applicable only to the enlisted accused. while the right against self-incrimination was applicable to all accuseds. This highlights the difference between the policy of the common law rule of confessions and the policy underlying the right against self-incrimination. The former is not intended to protect the accused; it is intended to protect the fact-finding process by excluding unreliable evidence, in this case an unreliable judicial confession. The latter is a personal right, intended to protect the thought process of the accused from government probing.

<sup>97</sup>Act of March 2, 1901, ch. 809, § 1, 31 Stat. 951 [hereinafter Act of 1901].

<sup>98</sup>Lederer, *Rights Warning in the Armed Services*, 72 Mil. L. Rev. 1, 3 n.11 (1976) (quoting Act of 1901).

<sup>99</sup>*Id.*

<sup>100</sup>"This nonconstitutional protection attached itself to the right against self-incrimination. It continued its attachment to the right, and today is embodied in UCMJ article 31(c).

ated some doubt about the applicability of the Act's proviso on self-incrimination to Army witnesses. This doubt about the status of Army witnesses other than the accused was an important factor in triggering the "Independent Respect" stage of development.<sup>101</sup>

#### 4. *Manual for Courts-Martial, 1905*

The 1905 Army Manual for Courts-Martial<sup>102</sup> tried to resolve the confusion regarding who was entitled to the protection of the right against self-incrimination by reiterating the language of the proviso in the Act of 1901, and omitting any language that implied the proviso pertained only to civilian witnesses. The Manual simply stated that "(no witness shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.)"<sup>103</sup> Unfortunately, this phrase did not settle the issue, because immediately following this language there was a footnote to the Act of 1901, which was the source of the confusion in the first place.

Of greater importance, the 1905 Manual purported to make a wholesale adoption of the common law rules of evidence. The duty of the judge advocate not to induce an enlisted man to plead guilty was retained, but the discussion about voluntary and intelligent pleas was deleted.<sup>104</sup> To fill the void left by the deleted provision, a new section entitled "Examination of Witnesses" was added. It stated that

[c]ourts-martial follow in general, so far as . . . [possible], the common-law rules of evidence as observed by the United States courts in criminal cases, but they are not required by statute to do so, and a certain latitude in the introduction of evidence and the examination of witnesses, by an avoidance of technical and restrictive rules, is permissible when it is in the interest of the administration of military justice.<sup>105</sup>

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<sup>101</sup>See *infra* notes 107-20 and accompanying text.

<sup>102</sup>A Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards, and of Other Procedures Under Military Law, rev. ed. 1905 [hereinafter MCM, 1905].

<sup>103</sup>*Id.* at 44.

<sup>104</sup>The complete change from the **ICM**, 1891 to the MCM, 1905 follows. The words within the brackets were in the ICM, 1891, but not in the 1905 Manual for Courts-Martial. The judge advocate

may ask a prisoner how he intends to plead; but, when the accused is an enlisted man, he should, in no case, try to induce him to plead guilty, or leave him to infer that, if he does so, his punishment will be lighter. [When, however, such a plea is voluntary and intelligently made the judge advocate should properly advise the prisoner of his right to offer evidence in explanation of his offense. . . .]

MCM, 1905 at 23.

<sup>105</sup>MCM, 1905 at 44.

This was a significant change from the 1891 Instructions for Courts-Martial, which selectively incorporated a very limited portion of the common law rules of evidence. The common law rules of evidence in force in federal courts, including the rules pertaining to confessions, would now be applicable at courts-martial, unless their application was not in the interest of the administration of military justice. This meant that confessions, not just pleas of guilty, had to be voluntary to be admissible, unless there was some other indication of reliability. The 1905 Manual retained, however, the different rules for enlisted and officer personnel concerning judicial confessions.<sup>106</sup>

In summary, the highlights of the early development stage were as follows: The Act of 1878 strengthened the accused's right against self-incrimination at courts-martial by forbidding adverse comment on the exercise of the right. The 1891 Instructions for Courts-Martial reiterated the right against self-incrimination and adopted a limited portion of the common law rule of confessions regarding judicial confessions of enlisted accuseds. The Instructions also required the accused's plea of guilty to be voluntary and intelligent. The Act of 1901 assured civilian witnesses the right against self-incrimination at courts-martial, but led to uncertainty concerning the applicability of the right against self-incrimination to Army witnesses. The 1905 Manual for Courts-Martial unsuccessfully attempted to clarify this uncertainty, but more importantly, the Manual adopted the common law rules of evidence wholesale. The common law rules of evidence, however, could be avoided in the interest of "military justice.")

## ***D. INDEPENDENT RESPECT FOR THE RIGHT: 1916 TO 1917***

### *1. Act of 1916*

The Act of August 29, 1916,<sup>107</sup> established the 1916 Articles of War. This was the first attempt to make large scale, significant revisions to the Articles of War, which had been basically unchanged since the Revolutionary War. The 1916 Articles of War contained a new article entitled "Compulsory Self-Incrimination Prohibited," article 24:

No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a

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<sup>106</sup>*Id.* at 23-24.

<sup>107</sup>Act of August 29, 1916, 39 Stat. 619 [hereinafter Articles of War, 1916]

military court, commission, court of inquiry, or board, *shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.*<sup>108</sup>

General Crowder, the Judge Advocate General, testified before Congress that article 24 extended the protection against self-incrimination to all witnesses at all formal hearings, not just those compelled to testify pursuant to the Act of 1901.<sup>109</sup> Thus, article 24 made it clear that the protection against self-incrimination was of general application to *all* witnesses at courts-martial *and* other quasi-judicial hearings in the Army.

Why was the right against self-incrimination extended beyond the court-martial? To answer this question, the concept of “compulsion,” as discussed in part II above, must be kept in mind. Compulsion resulted from placing a witness under oath and ordering him to testify. Quasi-judicial hearings had the authority to compel a witness in the same manner as a court-martial,<sup>110</sup> thus, it was logical to expand the right against self-incrimination to such hearings.

## 2. *Manual for Courts-Martial, 1917*

The 1917 *Manual for Courts-Martial*<sup>111</sup> also gave independent respect to the right against self-incrimination. Paragraph 233 of the Manual was entitled “Compulsory Self-Crimination Prohibited.” It stated that the “Fifth Amendment [right against self-incrimination] applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness.”<sup>112</sup> This laid to rest any doubt about the applicability of the right against self-incrimination to military witnesses.

The 1917 Manual also contained a discussion of the common law rule of confessions. Paragraph 225, entitled “Confessions,” declared that “[a]nother exception to the rule excluding hearsay evidence is

<sup>108</sup>*Id.* art. 24 (emphasis added).

<sup>109</sup>*Hearings on S. 3191 Before the Subcomm. on Military Affairs of the Senate Comm. on Military Affairs*, 64th Cong., 1st Sess. (1916).

<sup>110</sup>The enactment of the American Articles of War of 1806 granted courts of inquiry “the same power to summon witnesses as a court-martial, and to examine them under oath.” Article of War 91. *See* W. Winthrop, *supra* note 79, at 984. Article 118 of the 1874 Articles of War retained the same power for courts of inquiry. *Id.* at 995. Finally, the 1905 MCM not only referenced Article of War 118 and the power of the court of inquiry to summon and swear witnesses, it also declared that retiring boards “shall have such powers of a court-martial and court of inquiry” for purposes of conducting an inquiry. MCM, 1905 at 83-84, 87.

<sup>111</sup>A *Manual for Courts-Martial*, United States Army, 1917 [hereinafter MCM, 1917].

<sup>112</sup>*Id.* para. 233.

the rule that admits testimony as to confessions of guilt made by the accused.”<sup>113</sup> Paragraph 225 required the confession to be entirely voluntary<sup>114</sup> before it could be admitted, explicitly stating that “the reason for the rule is that where the confession is not thus voluntary there is always ground to doubt whether it be true.”<sup>115</sup> This unequivocal declaration of policy left no doubt that in the Army in 1917, as in civilian jurisdictions, the common law rule of confessions, concerned with trustworthiness of the confession, as measured by the degree of voluntariness in obtaining the confession, was the only law applicable to admissibility of confessions. The constitutional right against self-incrimination was not a factor in the admissibility of confessions, nor was the due process standard.

Significantly, paragraph 225 officially recognized, for the first time, that military rank could influence an accused to make a confession. Paragraph 225 stated that “[in] military cases, in view of the authority and *influence* of superior rank, confessions made by. . . [persons of inferior rank], especially when [they are] ignorant or inexperienced,” were generally suspect.<sup>116</sup> The 1917 Manual categorized confessions made by persons of inferior rank to a superior into three groups. The government had to meet a different burden of proof for each to admit the confession:

1. When the accused is “held in confinement or close arrest, . . . [the confession] should be regarded as incompetent unless *very clearly shown not to have been unduly influenced*.”<sup>117</sup>

2. When the accused is under charges, if there is “even a slight assurance of relief or benefit [made] by such superior . . . [the confession] *should not in general be admitted*.”<sup>118</sup>

3. When there is no showing that the confession was “made under the influence of promises or threats, etc., . . . [the confession] should, yet, in view of the military relations of the parties, be *received with caution*.”<sup>119</sup>

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<sup>113</sup>*Id.* para. 225.

<sup>114</sup>MCM 1917, para. 225, defined a confession as voluntary

when it is not induced or materially influenced by hope of release or other benefit or fear of punishment or injury inspired by one in authority, or, more specifically, where it is not induced or influenced by words or acts, such as promises, assurances, threats, harsh treatment, or the like, on the part of an official or other person competent to effectuate what is promised, threaten, etc.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.* (emphasis added).

<sup>117</sup>*Id.* (emphasis added).

<sup>118</sup>*Id.* (emphasis added).

<sup>119</sup>*Id.*



After identifying these potential sources of involuntary confessions, the drafters of the Manual recognized a new tool that was evolving in the investigatory arena to reduce the potential for involuntary, and thus untrustworthy, confessions. Paragraph 225 indicated a preference for the use of a preliminary warning to be given during investigations:

Considering, however, the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated?and the obligation *devolving* upon an investigating officer to warn the person investigated that he need not answer any question that might tend to incriminate him, confessions made by soldiers to officers or by persons under investigation to investigating officers *should* not be received unless it is shown that the accused was warned that his confession might be used against him or it is shown clearly in some other manner that the confession was entirely voluntary.<sup>120</sup>

The drafters of the Manual noted that an obligation to warn was *devolving* upon investigators, but apparently was not yet a clear obligation. This paragraph implied that if a warning was given, the resulting confession should be presumed to be voluntary, and thus trustworthy. If the warning was not given, then an affirmative showing of voluntariness should be required before the confession could be admitted. The warning was only a preferred practice?not a requirement.

Even though the warning was substantively about the constitutional right against self-incrimination, the preference for the warning was based on the common law rule of confessions and its concern for trustworthiness of confessions. The intent was to protect the fact-finding process, not the accused. Any benefit to the accused was incidental. The source of involuntariness, and thus the target that the warning was supposed to destroy, was the influence generated by rank and duty position in the Army. Therefore, the original policy objective behind the obligation to warn was to reduce the influence caused by the pressures of rank in the Army, and thus reduce the probability of unreliable confessions.

The independent respect stage was an important period in the development of the right against self-incrimination. Article of War 24 gave the right against self-incrimination independent recognition, and expanded the intended beneficiaries of the right to include mili-

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<sup>120</sup>*Id.* (emphasis added).

tary witnesses. Article 24 also extended the coverage of the right from courts-martial to quasi-judicial hearings. The 1917 Manual for Courts-Martial gave independent recognition to the right and recognized the influence of military rank and the duty position of an Army investigator as potential sources of involuntary confessions. The 1917 Manual also articulated a preference for the use of preliminary warnings during investigations to counteract the effects of improper influence caused by military rank and duty position.

It is important to understand that during this period of time references to the "voluntariness" of a confession dealt only with the common law policy of trustworthiness of the confession, not with due process fairness to the accused.

### ***E. EXPANSION OF THE RIGHT: 1917 TO 1951***

There were three legislative expansions of the right against self-incrimination following the enactment of Article of War 24 in 1916. At the same time, the common law rule of confessions as applied in the Army continued to expand, as did the warning requirement.

#### *1. Act of 1920*

The first expansion of the right against self-incrimination in the Army was the Act of June 4, 1920, which established the 1920 Articles of War.<sup>121</sup> This Act added the words "officer conducting any investigation" to the list of forums mentioned in Article of War 24 where a witness could not be compelled to incriminate himself.<sup>122</sup> An officer designated to conduct an investigation now had to respect the witness's right against self-incrimination. Was this a "minor revision"<sup>123</sup> or was it a significant step in the evolution of the right in the Army? A review of the probable reason for the addition of the words supports the latter conclusion.

The exact reason for this revision is not clear; however, the expansion of Article of War 114 in 1916 may provide the answer. Article 114 authorized certain persons to administer oaths. Until 1916, only persons directly involved with courts-martial or quasi-judicial hearings were authorized to administer oaths. Article 114 expanded the authority to allow "any officer detailed to conduct an investigation" the power to administer oaths.<sup>124</sup> Officers "detailed to conduct an in-

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<sup>121</sup>Act of June 4, 1920, ch. 227, 41 Stat. 792.

<sup>122</sup>See *supra* note 108 and accompanying text. The forums mentioned originally in Article of War 24 were courts-martial, commissions, courts of inquiry, and boards,

<sup>123</sup>See Lederer, *supra* note 98, at 4.

<sup>124</sup>Articles of War. 1916 art. 114.

vestigation" could now legally compel testimony in the same manner as courts-martial and quasi-judicial hearings. Logically, therefore, a witness called before an officer detailed to conduct an investigation, should be afforded the same protection that he would enjoy at the traditional criminal forums.

Although the change to article 114 was made in 1916, it appears that it took until 1920 to reconcile article 24 with article 114. The point to appreciate is that this seemingly minor change to Article of War 24 significantly expanded the boundaries restricting the right against self-incrimination beyond formal hearings to informal investigations.

## 2. *Manual for Courts-Martial, 1921*

The 1921 *Manual for Courts-Martial*<sup>125</sup> made a change with respect to rights warnings. The obligation to warn first announced in the 1917 *Manual* was expanded, but it remained a part of the common law rule of confessions, concerned with the trustworthiness of confessions. The expansions and clarifications were threefold.<sup>126</sup> First, in the 1917 *Manual*, the obligation to warn an accused was *devolving*; in the 1921 *Manual*, the obligation had *devolved* upon investigators, i.e., the 1921 *Manual* firmly established the obligation to warn. Second, the 1917 *Manual* asked *investigating officers* to give the warnings; the 1921 *Manual* *required* investigating officers and other *military superiors* to give the warnings. Finally, the 1917 *Manual* made no reference to civilian law enforcement officials having to warn; the 1921 *Manual* specifically stated that civilian police were under no obligation to warn under Article of War 24.

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<sup>125</sup>*Manual for Courts-Martial, United States Army, 1921*

<sup>126</sup>The complete modifications to the portion of paragraph 225(b), which contained the warning requirement, are shown below. The words in regular typeface were unchanged from the MCM, 1917, paragraph 225(b). In 1921, the words in italics were added, and the words within brackets were deleted:

*Where the confession was made to a civilian in authority, such as a police officer making an arrest, the fact that the official did not warn the person that he need not say anything to incriminate himself does not necessarily in itself prevent the confession from being voluntary. But where the confession is made to a military superior the case is different. Considering [however,] the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, land the obligation devolving] it devolves upon an investigating officer or other military superior, to warn the person investigated that he need not answer any question that might tend to incriminate him. Hence, confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him or it is shown clearly in some other manner that the confession was entirely voluntary.*

### 3. *The Elston Act of 1948*

The second legislative expansion of Article of War 24 occurred in 1948, with the enactment of the Elston Act.<sup>127</sup> The Act added a second paragraph to article 24:

The use of *coercion* or *unlawful influence* in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, that any statement by the accused may be used as evidence against him in a trial by court-martial.<sup>128</sup>

One writer believed the amendment contained three significant points.<sup>129</sup> First, it adopted by statute the common law exclusionary rule already found in the law of confessions. It adopted a warning requirement for the first time in a federal statute. Finally, it made the use of coercion or unlawful influence to obtain a statement a criminal offense. Was this the full extent of the importance of the amendment? Did the amendment merely adopt by statute the common law exclusionary rule already found in the law of confessions? What was the significance of statutorily requiring warnings? The Elston Act resulted in a radically changed law of confessions as applied in the Army, accomplishing much more than the three points listed above.

Under the common law exclusionary rule, judges measured the amount of coercion used to determine if an untrustworthy confession may have been given. The judges could admit the confession if some coercion, but not too much, was used. If the government proved that the confession was in fact accurate, despite the use of a great deal of coercion to obtain it, the exclusionary provision of the common law rule could be avoided. The exclusive policy underlying the common law rule was to admit only reliable confessions.

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<sup>127</sup> Act of June 24, 1948, ch. 625, § 214, 41 Stat. 792. The Act was known as the Elston Act because of Ohio Representative Elston's leadership in the enactment of this statute.

<sup>128</sup> *Id.* art. 24 (emphasis added).

<sup>129</sup> See Lederer. *supra* note 98, at 5.

The amendment to Article of War 24, on the other hand, required exclusion if coercion was used in “any manner whatsoever.” The amendment drew a bright line for judges to observe. Judges could no longer balance the amount of coercion to decide if the statement was reliable. Once the line was crossed, the statement was inadmissible. Trustworthiness of the confession was not the underlying policy behind this new rule. The true policy was to provide the means by which to enforce respect for the right against self-incrimination outside of the courtroom. The amendment to Article of War 24 represented a radical change in the law.

Why did Congress take such a bold step in the area of self-incrimination? It realized that article 24 needed “teeth” to make it enforceable. The “teeth” appeared in the provisions requiring automatic exclusion of evidence and placing criminal liability on the questioner, if coercion was used in any manner whatsoever. Congress knew the amendment was a drastic measure, but believed it was necessary to prevent the violation of the right against self-incrimination through the use of coercion and unlawful influence during pre-hearing investigations. Testifying in 1947 before the House Subcommittee on the Armed Services, General Hoover, a judge advocate general officer, said that the amendment to article 24 made it a criminal offense for investigators to exercise coercion. Representative Clason expressed his concern over creating potential criminal liability for investigators:

Mr. Clason: That is going to put . . . [the investigator] kind of in a hole, isn't it?

General Hoover: Well, we want him to be in somewhat of a hole on it, because we think it is a *protection to the accused persons* that they are entitled to.

Mr. Clason: I don't know. . . . I think that is going to be a pretty stiff proposition.<sup>130</sup>

As to the legal basis for this amendment, there is no doubt that the right against self-incrimination, embodied in the fifth amendment to the Constitution, served as the foundation. Representative Elston summarized the amendment to article 24 by saying to General Hoover, “You are giving to accused persons in a court-martial trial the same protection he gets under the Constitution in a civil trial.”<sup>131</sup> General Hoover concurred by stating, “That is right, and we are putting some teeth in it.”<sup>132</sup> Congress thus specifically recognized that

<sup>130</sup>*Hearings on H. R. 2575 Before a Subcomm. of the House Comm. on Armed Services, 80th Cong., 1st Sess. 2044 (1947) (emphasis added).*

<sup>131</sup>*Id.* at 2045.

<sup>132</sup>*Id.*

the constitutionally based right against self-incrimination could be violated not just through the use of compulsion at formal hearings, but also through the use of coercion and unlawful influence during pre-hearing investigations. The importance of placing this concept in a statute cannot be overemphasized. The amendment clearly accomplished more than merely adopting the existing common law rule of confessions.

Although the right against self-incrimination was recognized as the new legal foundation for preventing coercion and unlawful influence at any stage of the criminal investigative process, the first paragraph of article **24** was not modified to harmonize with the amendment. Thus under the first paragraph of Article of War **24** the violation of the right against self-incrimination through the use of compulsion was still limited to the judicial forum, quasi-judicial forums, and designated investigating officers.

There was another difference between the common law rule of confessions and the amendment, indicating the greater scope of the latter. The common law rule applied only to confessions. Admissions, which were circumstantially rather than directly incriminating statements, were not within the coverage of the common law rule of confessions.<sup>133</sup> The amendment, however, eliminated the artificial distinction between these types of pretrial incriminating statements by the accused, making both inadmissible if coercion or unlawful influence was used.

Finally, the common law rule was concerned only with coercion. Coercion is the application of overt force, either physical, mental, or both, of which the subject is aware. Coercion is used to create discomfort on a subject. To stop the discomfort, the subject must do what the person applying the coercion wants. The amendment recognized for the first time in a statute what had been recognized since the 1917 Manual, paragraph **225**, that in the military there are subtle and not so subtle pressures resulting from differences in rank and duty position. This pressure may be so subtle that subjects may not even be conscious of it or that they are responding to it. The people causing

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<sup>133</sup>Under the MCM 1921, para. 226, admissions were treated differently from confessions, which were under paragraph **225**. Paragraph **226**, entitled "Admissions Against Interest," demonstrated that the law of confessions was the only rule applicable to extra-judicial statements in the Army. It stated that "[s]omewhat connected with the subject of confessions is that of declarations or admissions against ones's own interest. This constitutes another exception to the rule excluding hearsay." Admissions fell short of a full confession, but they were important to connect the accused to the offense. The rule was that admissions were generally admissible. In other words, there was a vast difference in the evidentiary rules between confessions and admissions, even though the effect on the outcome of the trial was very similar.

the pressure may likewise be unaware that they are causing such pressure. Nonetheless, the effect is the same: the will of the subjects is overcome, and they confess although they would rather not. Congress recognized this phenomenon, particular to the military, and tried to curtail it. Congress created a catch-phrase for the subtle pressure: unlawful influence.

The curtailment of unlawful influence was a major goal of the Elston Act. The Act added article 88 to the Articles of War to prohibit unlawful command influence over the actions of a court-martial. Article 88 was a centerpiece of the Elston Act. The inclusion of the words “unlawful influence” in the amendment to article 24 may have reflected the overriding concern of Congress immediately after World War II with reducing the negative effect of rank superiority in the Army’s criminal justice process.

In summary, the Elston Act’s amendment to article 24 did not adopt the existing common law exclusionary rule of the law of confessions; it created a new legal principle that soldiers were entitled to effective enforcement of their right against self-incrimination during pretrial investigations.

The amendment adopted a warning requirement for the first time in federal statutes. But how was it different, if at all, from the pre-existing obligation to warn under paragraph 225 of the 1921 Manual? Under the amendment to article 24, failure to warn did not automatically result in exclusion of the confessions, as did the use of coercion and unlawful influence. Furthermore, failure to warn was not expressly made a criminal offense, as was the use of coercion and unlawful influence.

What was the practical consequence of making the duty to warn statutory? Before the amendment, warnings were preferred, but not required. Failure to warn created a rebuttable presumption that the confession was involuntarily obtained and thus was unreliable. The government could dispel the presumption by showing that no coercion or unlawful influence was used to obtain the confession. The government only had to show the unwarned confession was “otherwise voluntary.”

Paragraph 136(b) of the Manual for Courts-Martial, 1949, interpreted the Elston Act amendment’s requirement for warning as follows:

If the confession or admission was obtained from the accused in the course of an investigation, by informal interrogation or by any similar means, it may not be received in evidence

unless it appears that the accused, through preliminary warning *or otherwise was aware* of his right not to make any statement regarding an offense of which he was accused or concerning which he was being interrogated and understood that any statement made by him might be used as evidence against him in a trial by court-martial.<sup>134</sup>

Thus, when the accused had not been advised of his rights, the government could still escape the exclusionary rule if it could show the accused was otherwise aware of his right to remain silent and of the consequences of not remaining silent. The burden of showing that an accused was “(otherwise aware of his right to remain silent” is drastically different from the burden of showing that the confession was “otherwise voluntary.”

The critical difference concerning the duty to warn between the 1921 Manual and the Elston Act amendment, as implemented by the 1949 Manual, is as follows: under the 1921 Manual, warnings were exclusively a part of the common law of confessions, concerned with the trustworthiness of the confession. The goal was to protect the fact-finding process. Under the amendment to article 24, as implemented by the 1949 Manual, warnings were based on the constitutional right against self-incrimination. The goal was to ensure the accused was aware of his rights and the consequences of waiving those rights. A failure to warn could no longer be overcome by an affirmative showing that the confession was obtained without coercion or unlawful influence. Trustworthiness of the confession was no longer the sole concern of the warning requirement.

#### 4. *The Uniform Code of Military Justice, 1951*

The third and final post-1916 legislative expansion of the right against self-incrimination occurred in 1951 when the Uniform Code of Military Justice became effective. Article 31, UCMJ, replaced Article of War 24. It stated:

- (a) No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him.
- (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make

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<sup>134</sup>Manual for Courts-Martial, United States Army, 1949, para. 127 (emphasis added) [hereinafter MCM, 1949].



any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this Article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.<sup>135</sup>

A close comparison of Article of War **24** after the Elston Act with article 31 of the UCMJ reveals the significance of the final legislative expansion of the right against self-incrimination.<sup>136</sup>

Article 31(a) evolved from the first paragraph of Article of War **24**. There were, however, some major differences. Under article **24** the intended beneficiary of the protection was a “witness” in front of a judicial hearing, quasi-judicial hearing, or designated investigating officer. Under article 31(a), all of the restrictive language about specific forums where the right against self-incrimination applied was eliminated. Furthermore, the intended beneficiary was no longer a “witness,” but “any person.” This change in the language of the first paragraph of article **24** completed the process begun with the Elston Act. Under the Elston Act, “teeth” were added to prohibit coercion and unlawful influence, but not compulsion. Now, compulsion was prohibited everywhere and at all times, in the same manner as coercion and unlawful influence.

Article 31(b) evolved from the second paragraph of article **24**. Again, the UCMJ extended the protection previously available. Under article **24**, only the accused benefited from the warning requirement. Article 31(b) added a person *suspected* of an offense to the category of protected persons.

The content of the warning remained the same, except that article 31(b) added a warning concerning the nature of the accusation that was not present in Article of War **24**.

Perhaps the most significant difference between article **24** and article 31(b) was the effect on the admissibility of a confession if warn-

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<sup>135</sup>UCMJ art. 31.

<sup>136</sup>Of course, all previous developments in the right against self-incrimination and warning requirements discussed to this point occurred in the Army. The UCMJ applied the reforms previously made in the Army, and the new reforms created by the UCMJ, to all the military services.

ings were not given. Under article 24, the exclusion provision for unwarned confessions could be avoided if the government showed that the accused was otherwise aware of his rights. Under article 31(b) and (d), a failure to warn resulted in automatic exclusion of the unwarned confession.

Looking at article 31 from a purely logical standpoint and following the principle of natural statutory construction, the first three subsections state that no person subject to the Code can do *a*, *b*, or *c* (*a*: compel incriminating responses, *b*: interrogate a suspect or accused without providing warnings, or *c*: compel irrelevant degrading responses). The last part, subsection (d), states that if a statement is obtained in violation of *a*, *b*, or *c*, or through the use of *x*, *y*, or *z* (*x*: coercion, *y*: unlawful influence, or *z*: unlawful inducement), then the statement is inadmissible. Thus, there are six separate circumstances, or any combination of them, that would result in the exclusion of a statement. Observing the principle of natural statutory construction, if any one of the six circumstances occurs, the resulting statement must be excluded. It is illogical to interpret article 31(b) as requiring the occurrence of *x*, *y*, or *z* in *addition* to a violation of *a*, *b*, or *c* in order to exclude a statement. If such an interpretation had been intended by Congress, the conjunction "and" would have been used in subsection (d), instead of the conjunction "or." Thus, it is only logical that a failure to warn, as one of the six listed circumstances, requires automatic exclusion of the statement.

The manner in which the 1951 Manual for Courts-Martial implemented this automatic exclusion was peculiar. The 1951 Manual arbitrarily declared that failure to comply with article 31(b) was equivalent to coercion, unlawful influence, and unlawful inducement, resulting in an involuntary confession, and thus exclusion.<sup>137</sup> The

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<sup>137</sup>Manual for Courts-Martial, United States, 1951 para. 140a. Paragraph 140a lists the following examples of coercion, unlawful influence, and unlawful inducement in obtaining a confession or admission: 1) infliction of bodily harm; 2) threats of bodily harm; 3) imposition of confinement or deprivation of privileges; 4) promises of immunity or clemency; 5) promises of reward or benefit, of a substantial nature, likely to induce a confession or admission; 6) during an official investigation (formal or informal) in which the accused is a person accused or suspected of the offense, obtaining the statement by interrogation or request without giving a preliminary warning of the right against self-incrimination—except when the accused was aware of that right and the statement was not obtained in violation of Article 31b (for example, if the interrogators were civilian or foreign police); and 7) obtaining the statement in violation of article 31.

This list is identical to the list contained in paragraph 127, MCM, 1949, with the exception of numbers 6 and 7, which were added in 1951. This reflects the intent to make the warning requirements in article 31(b) absolute. In other words, a failure to warn made the confession per se involuntary.

warning requirement, however, rested on the right against self-incrimination since the Elston Act. For the drafters of the 1951 Manual to associate failure to warn with words such as “coercion,” “unlawful influence,” and “unlawful inducement,” all of which had historically been associated with the common law rule of confessions, appears to have been ill advised. That there has been so much confusion in this area of the law may stem in part from the choice of words expressed in the new legislative mandate.

The legislative history of the Elston Act reveals that rights warnings in the Army were required by the right against self-incrimination clause of the fifth amendment to the Constitution.<sup>138</sup> The legislative history of the UCMJ reveals that rights warnings in the military extended beyond the minimum requirements of the Constitution. Specifically, article 31(b) and (d) went beyond the Constitution by automatically excluding unwarned confessions. Mr. Felix Larkin, Assistant General Counsel of the Department of Defense and chief coordinator for the creation of the UCMJ, testified before Congress on behalf of the proposed article 31(b) as follows:

In addition we have provided, as you see, that a person *must* be first informed in effect that anything he says can be used against him. That is not a requirement normally found in civil courts—this provision of informing a man in advance. . . . But here [in Article 31(b)] we do provide that you *must* inform him in advance and if you don’t, then anything he says *is inadmissible* as far as he is concerned.<sup>139</sup>

When Representative Elston expressed some doubt over giving too much protection in article 31(c), the protection against compelled self-degradation, the following discussion relevant to article 31(b) took place between Representative Elston, Representative Brooks, and Mr. Larkin:

Mr. Elston: I think . . . [article 31(c)] gives too much protection. It enables the guilty person to escape.

Mr. Larkin: Well, in the same way providing an obligation to inform him before he speaks is *more* than the usual protection.

Mr. Brooks: You mean the constitutional provision?

Mr. Larkin: So far as incrimination is concerned.

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<sup>138</sup>See *supra* notes 130-32 and accompanying text.

<sup>139</sup>*Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 984, 985 (1949) (emphasis added) [hereinafter *UCMJ Hearings*].

Mr. Elston: That is all right. That is up above. . . . That is in subsection (b). That is perfectly all right.<sup>140</sup>

This discussion highlights the fact that in the minds of the congressmen, the Constitution, not the common law rule of confessions, was the policy basis for article 31(b). More importantly, however, the warning requirement provided *more* than usually required. Because the Constitution provides minimum requirements at all times, any protection that is more than the usual protection must be more than the constitutional minimum requirement.

Article 31(c) evolved from the first paragraph of article 24. Detailed analysis of this subsection is beyond the scope of this article because it deals with protection against self-degradation.<sup>141</sup>

Article 31(d) emanated from the second paragraph of article 24. Some of the effects of this subsection were discussed above.<sup>142</sup> There are two other significant differences worth noting. First, under article 24 the intended beneficiary of the protection against coercion and unlawful influence was the accused person or witness. Under article 31(d) the beneficiary was any person, including a suspect.

The second difference was that the scope of prohibited activities that would result in exclusion of confessions was increased from coercion and unlawful influence in Article of War 24, to a violation of article 31(a), (b), or use of coercion, unlawful influence, or unlawful inducement under article 31(d). The reason for the addition of the words "unlawful inducement" is not perfectly clear. When subsection (d) was originally proposed, it deleted the words "coercion or unlawful influence" found in article 24, and substituted therefor the words "unlawful inducement."<sup>143</sup> It seems the phrase "unlawful inducement" was intended to be all encompassing. This new approach did not win favor with some of the witnesses before Congress because they felt the phrase "unlawful inducement" was not adequately defined anywhere in the UCMJ. As a compromise, Congress included all three phrases in article 31(d).<sup>144</sup> The point to appreciate is that the phrase

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<sup>140</sup>*Id.* at 986 (emphasis added).

<sup>141</sup>Under article 24, the protections against self-incrimination and self-degradation were limited to the traditional forums. Under article 31(a), the constitutionally based protection against self-incrimination expanded beyond the traditional forums. The common law protection against self-degradation remained confined to military tribunals. This is circumstantial evidence that Congress intended article 31(a) to be interpreted broadly.

<sup>142</sup>See *supra* notes 136-40 and accompanying text.

<sup>143</sup>See *UCMJ Hearings*, *supra* note 139, at 983.

<sup>144</sup>*Id.* at 755. Proposed article 31 (numbered 30 when initially proposed) lacked the words "coercion" and "unlawful influence" found in Articles of War, 1948, art. 24, substituting therefor the words "unlawful inducement." Colonel John P. Oliver, JAG Re-

“unlawful inducement” embraced “coercion” and “unlawful influence;” it did not necessarily represent a totally independent type of misconduct by investigators.

The key points of the expansion stage are numerous. The revision of article 24 in 1920, when the term “officer conducting an investigation” was added to the list of forums where the right against self-incrimination applied, was arguably the first step in the expansion of the right beyond the confines of traditional tribunals. The 1921 Manual for Courts-Martial recognized that an obligation to warn had devolved upon investigating officers and other military superiors, but this obligation was based on the common law rule of confessions, and its underlying concern was the trustworthiness of the confession. The Elston Act transformed the warning requirement into a tool to effectuate the right against self-incrimination. The Act put teeth in the law to strengthen the right against self-incrimination against coercion and unlawful influence practiced during pre-hearing investigations. The warning requirement, however, could be overcome if the government could show the accused was otherwise aware of his rights. The UCMJ prohibited the use of compulsion at all stages of the criminal justice process, not just at formal hearings. Warnings were required to be given to suspects, and the government could not escape the exclusionary rule for unwarned confessions, even if the suspect or accused was otherwise aware of his rights. The 1951 Manual defined an involuntary confession as one that, among other things, was obtained in violation of the warning requirement. Thus a failure to warn resulted in a per se involuntary, and inadmissible, confession.

##### *5. Significance of the Developments of the Right Against Self-Incrimination and the Duty to Warn in the Military*

The courts-martial system as adopted from the British in 1775 did not recognize the right against self-incrimination or the common law rule of confessions. From this beginning, a gradual evolution from an inquisitorial to an accusatorial legal system took place. By 1951 military accuseds enjoyed most of the legal protection afforded civilian defendants in the federal criminal justice system. In some re-

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serve, Legislative Counsel of the Reserve Officers' Association of the United States, testified before the House subcommittee that he felt uncomfortable with deletion of the words from the law. He said that

we feel that the term “any unlawful inducement” should be defined. We can find nothing in the proposed military justice code that would indicate what may or may not compose unlawful inducement. We believe that the present article of war 24 presently used by the Army and Air Force should be inserted in place of subparagraph (d).

spects, military accuseds possessed greater protection under the UCMJ than their civilian counterparts did under the Constitution.

One of the areas where the protection of the accused extended beyond the minimum requirements of the Constitution was in the area of self-incrimination. Over 175 years of legislative reform in the area of self-incrimination in the Army culminated in article 31. This unique statute enumerated five ways in which the right against self-incrimination could be violated: 1) compulsion; 2) failure to warn of rights; 3) coercion; 4) unlawful influence; and 5) unlawful inducement. Even though these are different means of violating the right against self-incrimination, the important point is that Congress created the same penalties for using any of these means to violate a person's right.<sup>145</sup>

Article 31 combined the right against self-incrimination and the common law rule of confessions into one article. This fusion of two different legal principles with different histories and policy objectives produced a new, greater protection for military accused. Specifically, article 31(a) extended the traditional application of the right against self-incrimination from criminal trials "to all persons under all circumstances."<sup>146</sup> Article 31(b) created an absolute obligation to warn a suspect, as well as an accused, before any questioning takes place. Article 31(d) not only excluded confessions obtained in violation of subsections (a) and (b), but also if coercion, unlawful influence, or unlawful inducement were used to obtain the confession. Article 31, therefore, embraced multiple new policy objectives.

Why did Congress take the unprecedented step of creating an absolute requirement to warn? Although there is no mention of the specific reason for this during the congressional hearings, it may be assumed that Congress believed that in the military, warnings were essential to the effective exercise of the right against self-incrimination. Pressures of rank and duty position are not a problem in civilian law enforcement activities. Warnings in the military inform suspects that they have a right not to answer any questions concerning the matter under investigation, regardless of the questioner's rank or duty position.

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<sup>145</sup>The use of any of the five means for violating the right was intended to result in two consequences: criminal liability; and exclusion of evidence from use at courts-martial. This was an attack upon individual violators of the right against self-incrimination and upon the law enforcement system if it could not ensure proper conduct by its officers.

<sup>146</sup>Uniform Code of Military Justice, Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense 47 (1950).

The warning, however, also reminds the questioner that the suspect is entitled to the right against self-incrimination. Military leaders operate in an authoritarian environment. They often expect immediate answers to their questions from subordinates. Warning a suspect reminds the questioner of the suspect's constitutional right.

It is also possible that another policy objective of the warning requirement is that the warnings do indeed *warn* suspects that they are facing situations where it may be advantageous to exercise that right. In the military, unlike the civilian community, it may not always be clear that such a situation exists. Military leaders often perform law enforcement functions as part of their duties. In the civilian community, only police officers are generally involved in law enforcement activity. Therefore, military suspects may know in a general sense that they have a right to remain silent, and they may know the consequences of waiving that right, but they may not be aware that they face adversarial situations where they might want to exercise that right. For example, a suspect may believe that a platoon sergeant is inquiring about personal finances to help the suspect balance a bank account. The suspect does not realize that the sergeant is asking the questions in a law enforcement capacity, to get evidence against the soldier for later use at a court-martial. Warnings by the platoon sergeant would alert the suspect of the danger faced, allowing the suspect to make an intelligent decision concerning the waiver of the right to remain silent.

The change in paragraph 136(b) of the Manual for Courts-Martial from 1949 to 1951 implemented article 31(b)'s policy objective of actually *warning* a suspect of the hidden self-incrimination pitfalls lurking in certain types of questioning. The 1949 Manual contained a narrow escape clause for avoiding the exclusion of an unwarned confession: the government could show that the accused was generally *aware* of his or her rights, even if not warned. The 1951 Manual eliminated that escape clause, making an unwarned confession per se inadmissible. This change demonstrates that the broadest policy objective of article 31(b) was to actually *warn* suspects of the possible need to exercise their constitutional rights in particular situations.

#### **IV. TESTS DEvised BY THE COURT OF MILITARY APPEALS TO DETERMINE WHO MUST GIVE ARTICLE 31(b) WARNINGS**

Why has there been so much difference of opinion over the seemingly simple language of article 31(b)? The answer is that different judges on the Court of Military Appeals have emphasized dif-

ferent policy objectives embodied in the warning requirement. Consequently, they formulated different tests to implement the different policy objectives.

The Court of Military Appeals has demonstrated some difficulty in adhering to any one test. Over the years, the judges have created four different tests to interpret the meaning of article 31(b): 1) the *Wilson* literal interpretation test; 2) Judge Latimer's officiality test; 3) the *Duga-Gibson* officiality plus perception test; and 4) the *Dohle* position of authority test. Part IV will summarize the facts of the lead cases and the tests will be identified. It will also discuss the rationale and underlying policy of each test, as well as the test's strengths and weaknesses. Before discussing the tests, collateral issues surrounding the question of who should warn under article 31(b) will be briefly examined to narrow the scope of the central discussion.

### A. ARTICLE 31(b): PRELIMINARY ISSUES

The plain language of article 31(b) sets three conditions before a person is required to give warnings: 1) the person must be subject to this chapter; 2) the person must be interrogating or requesting a statement; and 3) the person must be questioning an accused or suspect. Some of the legal issues implicit in these conditions are well settled and will not be discussed in detail. They are issues of fact, not law, and will be identified to narrow the scope of the principal discussion to the unsettled legal issue.

What does the first condition of "subject to this chapter" mean? The chapter refers to the Uniform Code of Military Justice.<sup>147</sup> Article 2 of the UCMJ defines very clearly who is subject to the Code. Basically, article 2 refers to persons on active duty in the United States armed forces.<sup>148</sup>

Civilian and foreign law enforcement officials are not subject to the code. Yet they often interrogate and request statements from active duty military persons suspected of crimes. Although some thought civilian law enforcement officers ought to be required to follow article 31(b), most congressmen decided to exclude civilian and foreign law enforcement officials from the warning requirement because these officials would probably be unfamiliar with the requirements of article 31(b).<sup>149</sup> Even if the civilian and foreign officials were familiar with article 31(b), there would be no way to force compliance.

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<sup>147</sup>The specific chapter number was 22; the original citation to the UCMJ was Title 50 U.S.C. (Chap. 22) §§ 551-736.

<sup>148</sup>UCMJ art. 2.

<sup>149</sup>See *UCMJ Hearings*, *supra* note 139, at 991-92.



A different situation exists when the civilian or foreign law enforcement official acts as the knowing agent of the military. In 1954 the Court of Military Appeals decided that if an agency relationship existed between the civilian or foreign questioner and a military law enforcement official, article 31(b) warnings were required.<sup>150</sup> The court explained that for an agency relationship to exist, the nonmilitary questioner must have acted under the direct control or supervision of the military official, or must have acted solely in the furtherance of a military investigation. If the civilian or foreign questioner had nonmilitary motives for his actions, then no agency relationship existed.<sup>151</sup> The only issue for the trial judge is factual: did an agency relationship exist under the circumstances? Military Rule of Evidence 305(b)(1) adopted the court's interpretation of article 31(b), defining a "person subject to the code" as including "a person acting as a knowing agent of a military unit or of a person subject to the code."<sup>152</sup>

Recognition of this agency relationship has been the only judicial expansion of the plain meaning of the words of article 31(b). All of the other tests developed by the Court of Military Appeals have either given a literal interpretation of the words, or more often, constricted the plain meaning of the words.

What does the second condition of "interrogating or requesting a statement" mean? Military Rule of Evidence 305(b)(2) defines interrogation as including "any formal or informal questioning in which an incriminating response is either sought or is a reasonable consequence of such questioning."<sup>153</sup> The Supreme Court has interpreted the term "interrogation" to include any *conduct* reasonably calculated to elicit a *response*.<sup>154</sup> Spontaneous, unsolicited statements from a suspect or accused, however, do not require article 31(b) warnings.<sup>155</sup> The only issue for the trial judge is a factual one: was the conduct of the military official reasonably calculated to elicit a response, or was the statement unsolicited?

What does the third condition of questioning an "accused or suspect" mean? An accused is a person against whom charges have been preferred.<sup>156</sup> A suspect is a person who the questioner reasonably be-

<sup>150</sup>*See, e.g.*, United States v. Grisham, 16 C.M.R. 268 (C.M.A. 1954).

<sup>151</sup>*Id.* at 270.

<sup>152</sup>Mil. R. Evid. 305(b)(1) and 305(h).

<sup>153</sup>Mil. R. Evid. 305(b)(2).

<sup>154</sup>*See, e.g.*, Brewer v. Williams, 430 U.S. 387, 399-400 (1977).

<sup>155</sup>*See, e.g.*, United States v. Creamer, 3 C.M.R. 1, 7 (C.M.A. 1952); *see also* Mil. R. Evid. 305(c) analysis.

<sup>156</sup>*See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 307(b). R.C.M. 307(b) specifies how charges are preferred by an accuser against a person subject to the Code, thereby transforming a person subject to the Code into an "accused" person.

lieves may have committed an offense.<sup>157</sup> Whether the questioner holds such a belief will be determined by the trial judge using an objective, reasonable standard test in light of all the information the questioner possessed. The issue is a factual one: did the government official reasonably suspect the person of committing a crime?

## ***B. THE TESTS***

Since 1953 the judges on the Court of Military Appeals have been trying to reach a lasting consensus on who is required to warn under article 31(b). The task has been difficult because of the multiple policy objectives underlying the warning requirement. Thus, judges are able to legitimately choose the interpretation of article 31(b) emphasizing the policy objective they prefer. The first case to raise the issue before the court was *United States v. Wilson*.<sup>158</sup>

### *1. The Wilson Literal Interpretation Test*

Corporal Austin Wilson, Jr., and Private Bennie Harvey, U.S. Army, were convicted of premeditated murder of a South Korean civilian. The murder took place in Puchang-ni, South Korea, on April 10, 1951. The operative facts of the case follow:

A military police sergeant named Wang, while on patrol duty, received notice of a shooting in the 503d Battalion area. He went to the area and there observed a group of soldiers standing about a fire. A military policeman pointed out . . . [Wilson and Harvey] as the persons identified to him by a group of Koreans as the men who had shot their countryman. The sergeant approached the group and, without addressing any member by name—but looking directly at [Wilson and Harvey]—asked who had done the shooting. He made no preliminary reference to the privilege against self-incrimination secured at that time by Article of War 24. . . . [Wilson and Harvey] responded to the question with the statement that they had “shot at the man.”<sup>159</sup>

Even though Article of War 24 was in effect at the time of the shooting, for reasons beyond the scope of this article the majority of the court decided to apply article 31(b). Thus, the decision of Judge Brosman, concurred in by Chief Judge Quinn, was based on article 31(b).

In reaching its decision, the court made it clear that the admission

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<sup>157</sup>See, e.g., *United States v. Leiffer*, 13 M.J. 337 (C.M.A. 1982).

<sup>158</sup>8 C.M.R. 48 (C.M.A. 1953).

<sup>159</sup>*Id.* at 54.

by the appellants was voluntary in the traditional sense.<sup>160</sup> In other words, Sergeant Wang used no coercion or unlawful influence to extract the admission from the appellants. Next, the court spelled out article 31(b) and (d). The court then announced its test and rationale. It declared that the

provisions [of article 31(b) and (d)] are as plain and unequivocal as legislation can be. According to the Uniform Code, Article 2, 50 USC § 552, Sergeant Wang was a “person subject to this code,” and [Wilson and Harvey], at the time the question was directed to them, were persons “suspected of an offense.” Consequently, the statements should have been excluded in accordance with Article 31(d), and their admission was clearly erroneous.<sup>161</sup>

The court interpreted the language of article 31(b) and (d) *literally*. The test was simply to ascertain whether the questioner was subject to the Code and whether the person questioned was a suspect or accused.

After concluding that it was error to admit the unwarned statements into evidence, the court faced the issue of whether the error was prejudicial to the accused, requiring reversal of the convictions. It was at this point, after deciding that the “plain and unequivocal” language of article 31(b) and (d) required a preliminary warning, that the court said:

Where—as here—an element of *officiality* attended the questioning which produced the admissions, there is more than a violation of the naked rule of Article 31(b) . . . ; there is an abridgement of the policy underlying the Article which must—we think—be regarded as “so overwhelmingly important in the scheme of military justice as to elevate it to the level of a ‘creative and indwelling principle’.” To put the matter otherwise, we must and do regard a departure from the clear mandate of the Article as generally and inherently prejudicial.<sup>162</sup>

The test for deciding who must warn under article 31(b) was what the plain and unequivocal language of article 31(b) required. Whether there was or was not an element of officiality attending the questioning was only a factor on appeal to determine whether the error was inherently prejudicial.

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<sup>160</sup>*Id.*

<sup>161</sup>*Id.* at 55.

<sup>162</sup>*Id.* (citations omitted) (emphasis added).

What policy did this test effectuate? Judicial restraint was the court's policy objective. Judge Brosman and Chief Judge Quinn recognized that under Article of War **24**, military officers and investigators had a duty to warn accused persons, but that article 31(b) extended the duty to warn to include suspects. This change was "a new legislative mandate which redound[ed] to the benefit of an accused person."<sup>163</sup> Judge Brosman concluded that "[i]t is, of course, beyond the purview of this Court to pass on the soundness of the policy reflected in those portions of Article 31 [(b) and (d)] . . . which extend the provisions of its comparable predecessor, Article of War **24** . . . and no sort of opinion is expressed thereon."<sup>164</sup>

Judge Brosman and Chief Judge Quinn made it clear that they were not going to judge the wisdom of Congress for extending the duty to warn to suspects. They refused to give a clearly written law an interpretation contrary to its plain and unequivocal meaning just because they might have disapproved of the law. In their view, that would have been unacceptable judicial legislation.

What were the strengths of the literal interpretation test? This test contained two interrelated strengths: it implemented the policy of judicial restraint, and it provided a suspect or accused the most extensive blanket of protection. The policy of judicial restraint is a cornerstone of our American system of government. Under the constitutional framework of government, judges lack the authority to substitute their judgment for Congress's, unless the statute fails to meet the minimum protections afforded by the Constitution. Article 31(b), however, affords military suspects more protection than the Constitution requires. Thus, it may be argued that the judges of the Court of Military Appeals lack the legal authority to curtail the additional protection granted by Congress in article 31(b) by interpreting the language more restrictively than its plain meaning. The only justification for a narrower interpretation would be if there was something in the legislative history of the warning requirement compelling an unnatural interpretation of article 31(b). The legislative history of article 31(b), however, does not compel such an interpretation.

By giving the words of article 31(b) their plain meaning, the Court of Military Appeals created the largest possible blanket of protection for suspects and accuseds in the area of rights warnings. The tests that followed *Wilson* provided a much smaller blanket of protection, by restricting, in varying degrees, the extent of coverage of article 31(b).

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<sup>163</sup>*Id.*

<sup>164</sup>*Id.*

The literal interpretation test contained three principal weaknesses: it excluded relevant, trustworthy confessions under more circumstances than did the subsequent tests; it created criminal liability for friends of the suspect who asked questions for personal reasons; and it reduced the effectiveness of counseling sessions conducted by military superiors trying to help subordinates in trouble.

By providing the largest blanket of protection for the individual, the literal interpretation test necessarily excluded relevant, trustworthy confessions more often than any of the subsequent tests. The more often reliable confessions are excluded from trial, the less often the trial fact finder will arrive at an accurate result, because less information exists on which to base a decision.

The second weaknesses with the literal interpretation test ensued from the fact that the test required warnings in situations where the questioner only had personal motives, not official motives, for talking to the suspect. In other words, it applied even where the questioner was not representing the United States government during questioning of the suspect. For example, if a soldier wanted to provide helpful guidance to a friend that he suspected of having committed a crime, the soldier could not talk to the friend about the crime without first providing article 31(b) warnings. If the soldier intentionally failed to provide article 31(b) warnings before asking the friend a question about the crime, the soldier would be subject to criminal liability under article 98, UCMJ, even if he was only trying to help the friend do the right thing.

Article 98 imposed criminal liability for an intentional violation of article 31(b), regardless of the questioner's motive. Although to date there has never been a reported case of a conviction under article 98 for a violation of article 31(b), the drafters of the Code intended article 98 to be an important part of the enforcement mechanism for article 31.<sup>165</sup> The literal interpretation test could have resulted in criminal liability for a friend of a suspect who tried to help the suspect correct his ways. Congress could not have intended for such an absurd situation to occur.

The third weakness with the *Wilson* literal interpretation test was that it could have significantly reduced the effectiveness of counseling sessions in the military. The test required warnings even in situations where the questioner was acting in an official, but not a law enforcement capacity. For example, if a first sergeant wanted to provide marriage counseling to a young soldier experiencing marital

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<sup>165</sup>See *infra* note 147 and accompanying text.

problems, but he suspected the soldier of adultery, the first sergeant had to first advise the soldier of his right against self-incrimination. Assuming the first sergeant was motivated by his official duty to ensure the health and welfare of his troops, it could be said he represented the government in an *official* capacity, but, he was not representing the government in a *law enforcement* capacity. In other words, the information sought by the first sergeant was not intended for use at court-martial.

The problem with this scenario is that after the warnings, the soldier would probably be very reluctant to talk to the first sergeant. Even if the soldier decided to talk, the rights warnings would certainly chill the discussion, thus reducing the effectiveness of the counseling. The literal interpretation test's potential for severely limiting the usefulness of counseling sessions between a military leader and his subordinates was a significant weakness of the test.

Supporters of the literal interpretation test might respond to this criticism by arguing that the first sergeant in the scenario did not really have to warn the soldier, even though article 31(b) technically required it. The rationale is that, because the consequence for not warning is the exclusion of the evidence at court-martial, and because the evidence was not obtained for use at court-martial, then nothing was lost by intentionally ignoring article 31(b). This argument, however, reflects a dangerous attitude that it is all right to ignore the law, so long as the consequences are acceptable. The first sergeant would also have been subject to criminal liability under article 98 if he intentionally ignored the proscription of article 31(b).

## 2. Judge Latimer's Officiality Test

Judge Latimer dissented in the *Wilson* case. He believed that "Congress undoubtedly intended to enlarge the provisions of Article of War 24, . . . but [he did] not believe it intended to go so far as to prevent all legitimate inquiries."<sup>166</sup> Unless the questioning had an element of officiality, there should be no duty to warn, and thus there would be no error in admitting the statement. Judge Latimer's view of the officiality condition differed from Judge Brosman's and Chief Judge Quinn's views in a profound way. The *Wilson* majority viewed the officiality condition as a factor for the appellate review boards to consider in determining whether the error of admitting an unwarned confession was inherently prejudicial. Judge Latimer viewed the officiality condition as a factor for the trial judge to consider in determining the admissibility of the confession.

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<sup>166</sup>United States v. Wilson, 8 C.M.R. at 60 (Latimer, J.,dissenting).

The officiality test as originally expressed by Judge Latimer contained three conditions. A person subject to the code had a duty to warn only if: 1) the person asking the question occupied some official position in connection with law enforcement or crime detection; 2) the inquiry was in furtherance of some official investigation; and 3) the facts had developed far enough that the person conducting the investigation had reasonable grounds to suspect the person interrogated had committed an offense.<sup>167</sup>

What policy did the officiality test implement? Judge Latimer believed that the practical necessities of law enforcement had to be considered when interpreting article 31(b).

I cannot believe Congress intended to silence every member of the armed forces to the extent that Article 31 . . . must be recited before any question can be asked. . . . Congress passed an act which is couched in broad and sweeping language, and, if it is not limited by judicial interpretation, then the ordinary processes for investigating crime will be seriously impaired.<sup>168</sup>

Judge Latimer cited no authority to support his belief.

What were the strengths of the officiality test? First, it struck a more proportioned balance, as compared to the literal interpretation test, between the suspect's need for protection and the government's need for the admission of relevant, reliable confessions into evidence. The officiality test accomplished this feat by requiring warnings only if the questioner was motivated by an official law enforcement concern. Mere official questioning, such as a counseling session, was not enough to trigger article 31(b). The questioning had to be "in furtherance of an official investigation," or in other words, a law enforcement activity.

Judge Latimer did not find any express support for his conclusion in the congressional hearings on the UCMJ. Strong circumstantial evidence, however, supported his position. First, the overall history of the right against self-incrimination and the rights warnings supports the officiality condition. The right against self-incrimination limited the criminal law enforcement powers of the *government*. The right was not intended to protect individuals from questioning conducted by persons acting on personal motives. The right was also not intended to protect individuals from asking questions, even if they

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<sup>167</sup>*Id.* at 61.

<sup>168</sup>*Id.*

were government officials, who sought information for non-law enforcement use. Historically, rights warnings were only required when the questioner interrogated a suspect on behalf of the government, while acting in a law enforcement capacity. This is precisely how Judge Latimer interpreted article 31(b).

Another strength of the officiality test was that it maintained the effectiveness of the deterrent effect embodied in exclusionary rule of article 31(d). The purpose of the exclusionary provision of article 31(d) is to punish the government if it uses methods that violate the right against self-incrimination. The theory is that the government will attempt to avoid the exclusion of confessions, and thus be forced to respect an individual's right against self-incrimination. Accordingly, article 31(d) should not be used to punish the government in a situation where there was no governmental action. The officiality test maintains the effectiveness of the deterrent effect of article 31(d) by applying it only to situations which are truly deserving.

Finally, the officiality test eliminates the potentially absurd situation of imposing criminal liability under article 98 on a soldier who tries to steer a friend in trouble in the right direction. Article 98 seeks to punish *individuals* subject to the Code who violate provisions of the Code, rather than seeking to punish the *government*, as does article 31(d). If the questioner who failed to warn the suspect was only trying to help the suspect as a friend, or counsel him as his leader, what purpose is served by punishing the questioner? Persons subject to the Code would be deterred from helping friends in need, rather than deterred from violating the Code. Thus, camaraderie within the unit could be diminished. Assuming that camaraderie enhances a unit's fighting capabilities, a reduction in these commodities would consequently reduce the unit's fighting capabilities. The officiality test avoids this negative impact on military units by removing the threat of criminal liability from those who seek to help and to counsel friends and subordinates in need.<sup>169</sup>

The officiality test is not perfect. Regardless of how logical the officiality test may appear, and how much circumstantial evidence exists in its support, it is inconsistent with the plain language of article 31(b). Judge Latimer did not provide any authority to support his belief that Congress intended an officiality condition before warnings were given. Even though the right against self-incrimination

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<sup>169</sup>That article 98 has not yet been used to prosecute anyone successfully for a violation of article 31(b) is possibly due in part to the fact that the officiality condition has been required by the Court of Military Appeals for most of the UCMJ's existence. *See infra* notes 171-204 and accompanying text.



was intended to limit only governmental law enforcement action, article 31(b) plainly goes beyond that minimum requirement. The legislative record reflects some congressional intent to provide *more* protection under article 31(b) than what is required by the Constitution.<sup>170</sup> The lack of explicit legislative history supporting Judge Latimer's officiality condition, and the existence of some evidence contrary to his position, undercut the otherwise strong logic of the test.

Another imperfection with the officiality test is its difficulty of application, relative to the literal interpretation test. Under the officiality test, the trial judge is expected to conduct an objective inquiry into the subjective motives of the questioner. In some cases, this may be difficult to do, thus increasing the probability of inconsistent results occurring in cases with similar facts.

Finally, the officiality test creates too great of an opportunity for the trial counsel to shape the testimony of the questioner as to the motive for asking the questions. Before trial, the shrewd trial counsel could subtly persuade the questioner that the questioner's motives were purely personal, or not law enforcement related, even if the questioner had some doubts about his motives before seeing the trial counsel. If the trial counsel persuades the questioner, and the questioner persuades the judge, the confession will be admitted despite the official law enforcement nature of the questioning.

The boards of review decisions following *Wilson* focused on the element of officiality surrounding the questioning.<sup>171</sup> In each case the boards examined the facts to determine whether the questioner acted in an official law enforcement capacity, in furtherance of an official investigation. Generally, the boards of review held that if the questioner did not act in an official law enforcement capacity, there was no need to warn and thus no error in admitting the unwarned confession.<sup>172</sup> The boards of review seem to have taken the "officiality" language used by the majority in *Wilson* and applied it in a manner more consistent with Judge Latimer's dissenting opinion.

When were warnings required? If the questioner was a military policeman interrogating a suspect, in furtherance of an official investigation into a specific offense, then rights warning were clearly required.<sup>173</sup> The boards of review interpreted the officiality condition

<sup>170</sup>See *UCMJ Hearings*, *supra* note 139, at 986.

<sup>171</sup>Maguire, *The Warning Requirement of Article 31(b): Who Must Do What to Whom and When?*, 2 Mil. L. Rev. 1, 8 (1958).

<sup>172</sup>*Id.*

<sup>173</sup>See, e.g., *United States v. Fisher*, 11 C.M.R. 325 (A.B.R. 1953), *rev'd on other*

as also applicable to persons other than those occupying law enforcement positions. Officers performing law enforcement *functions* had to give warnings, even if they were not military policemen. For example, if commanders conducted preliminary investigations of alleged crimes in their units, they had a duty to warn.<sup>174</sup> Likewise, if the installation inspector general conducted an investigation into alleged crimes at the direction of the commander, the investigator had a duty to warn.<sup>175</sup> The key to the officiality condition, therefore, was to determine the questioners' motives or capacities in which they acted, rather than the positions they occupied.

When were warnings not required? In *United States v. Williams*<sup>176</sup> warnings were not required when the unit commander relieved the custodian of an official fund from that position, even though the commander suspected the custodian of larceny and questioned him concerning the missing money. The Air Force Board of Review found that the commander was performing an official duty incident to command, not a law enforcement duty. Since the commander was not acting as a law enforcement official, he had no obligation to warn the suspect. In *United States v. King*<sup>177</sup> the court found that a sergeant was performing duties as health and welfare counselor, not law enforcement official, when he questioned a soldier about the soldier's slovenly appearance. Even though the sergeant suspected the soldier of some misconduct, the sergeant's motive was to provide guidance and counseling to the soldier concerning personal hygiene; thus he had no duty to warn. The boards of review recognized that military leaders perform many official duties.<sup>178</sup> The officiality test created by Judge Latimer and adopted by the boards of review required rights warning only when the questioner discharged his official *law enforcement* duties.<sup>179</sup>

### 3. The Duga-Gibson Officiality Plus Perception test

*United States v. Duga*<sup>180</sup> sets forth the test currently being used by the Court of Military Appeals to answer the question of who must

grounds. 15 C.M.R. 152 (C.M.A. 1954); *United States v. Murray*, 12 C.M.R. 794 (A.F.B.R. 1954).

<sup>174</sup>See, e.g., *United States v. Cox*, 13 C.M.R. 414 (A.B.R. 1953).

<sup>175</sup>See, e.g., *United States v. Taylor*, 10 C.M.R. 669 (A.F.B.R. 1953).

<sup>176</sup>11 C.M.R. 521 (A.B.R.), *pet. denied*, 13 C.M.R. 142 (C.M.A. 1953).

<sup>177</sup>13 C.M.R. 261 (A.B.R. 1953), *pet. denied*, 14 C.M.R. 228 (C.M.A. 1954).

<sup>178</sup>Maguire, *supra* note 171, at 8. Maguire states that "[t]he decisions of the boards of review indicate their awareness of this distinction," meaning the distinction between a person acting in an official capacity in general and one acting specifically in an official law enforcement investigative capacity. *Id.*

<sup>179</sup>See *supra* note 167 and accompanying text.

<sup>180</sup>10 M.J. 206 (C.M.A. 1981).

warn under article 31(b). *Duga* requires that two conditions be satisfied before warnings are given: 1) the questioner acted in an official capacity;” and 2) the suspect perceived the official nature of the questioning. This test was originally articulated in *United States v. Gibson*,” which was decided in 1954, just one year after *Wilson. Gibson* and *Duga* will be discussed in chronological order.

In *Gibson* the accused was placed in pretrial confinement because he was suspected of stealing money from vending machines on Fort Sill, Oklahoma. A Criminal Investigations Division (CID) agent instructed the provost sergeant in charge of the confinement barracks to assign another prisoner to watch Gibson to see if he could get some information. The CID agent suggested that a good reliable “rat” be selected for the job. The provost sergeant assigned Private First Class Jimmie Ferguson to Gibson’s confinement barracks for that purpose, because Ferguson was already in confinement on unrelated charges, and the provost sergeant believed Ferguson to be a good “rat.” The provost sergeant did not tell Ferguson specifically what type of information to get from Gibson, but did tell Ferguson that he could visit the CID office whenever he needed to.

Ferguson testified at Gibson’s court-martial that at the time he was assigned to the same confinement barracks with Gibson, he already knew Gibson from a previous mutual confinement. Based on this prior acquaintance, Ferguson asked Gibson why he was confined this time. Ferguson, of course, did not preface the question with a rights warning. Gibson confessed that he had broken into the vending machines and stolen the money. Ferguson retold the confession at Gibson’s court-martial.

Chief Judge Quinn, with Judge Brosman concurring, first made a factual determination that “the evidence permits no conclusion other than that Ferguson was placed near Gibson at the direction of agents of the [Criminal Investigative] Division for the sole purpose of procuring incriminating statements.”<sup>183</sup> The court found that Ferguson acted as official agent of the CID, and thus believed his questioning

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“Although the *Duga* test uses only the words “official capacity” and not “official law enforcement capacity,” it is clear from the rationale used in the *Duga* decision that “official law enforcement capacity” is what was meant. Specifically, *Duga* admits that it relies exclusively on the rationale of *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954). The first condition of *Gibson* was based on Judge Latimer’s officiality condition, which carried with it the law enforcement modifier. Furthermore, the cases subsequent to *Gibson* and *Duga* both recognized the difference between a person acting in discharge of an official duty and one acting in discharge of an official law enforcement duty. Only the latter had to warn under article 31(b).

<sup>182</sup>14 C.M.R. 164 (C.M.A. 1954).

<sup>183</sup>*Id.* at 168.

was motivated by official law enforcement concerns.<sup>184</sup> In doing so, the court implicitly accepted the officiality requirement articulated by Judge Latimer in *Wilson*, and rejected the literal interpretation test. If Chief Judge Quinn and Judge Brosman had ended their analysis there, under the facts of this case, the officiality condition was satisfied, and warnings were required. The judges, however, did not cease their inquiry there.

Chief Judge Quinn reviewed the history of article 31(b) and concluded that it was intended to alleviate the pressures generated by “the effect of superior rank or official position upon one subject to military law.”<sup>185</sup> The Chief Judge said “[n]o one could reasonably infer from any of the surrounding circumstances that . . . [Gibson] was placed in such a position as to compel a reply to questions asked by Ferguson. The voluntariness of his statement is beyond question.”<sup>186</sup>

In effect, *Gibson* required satisfaction of *two* conditions before a duty to warn existed. Judge Brosman’s concurring opinion clearly identified the two conditions:

Judge Latimer’s view appears to be that, while officiality must exist to justify an invocation of Article 31(b), it will suffice if the questioner alone is aware of this officiality. Judge Quinn, on the other hand, and contemplating an “implied coercion” criterion, would require in *addition* that the person questioned have reason to be aware of the official character of the interview.<sup>187</sup>

In other words, the *Gibson* test required officiality plus perception to trigger article 31(b).

Twenty-one years after *Gibson*, *Duga* expressed the same test. In that case the accused was convicted of larceny of a canoe from the Lowry Air Force Base recreational vehicle storage area. A key government witness was Airman Byers, an Air Force security policeman. Byers testified at Duga’s court-martial that Duga confessed to him.

Shortly after the theft of the canoe, an agent of the Office of Special Investigations (OSI) asked Byers if he knew anything that might connect Duga to the thefts from the base recreational vehicle storage area. Byers gave the agent no useful information. The agent then told

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<sup>184</sup>“There remains to be considered, then, only whether the deceit practiced by Ferguson and the agents of the Division in concealing Ferguson’s *official position* requires the exclusion of the statement.” *Id.* at 171 (emphasis added).

<sup>185</sup>*Id.* at 170.

<sup>186</sup>*Id.* at 171.

<sup>187</sup>*Id.* at 172.

Byers that “if [he] could give him any more information, it would be of help to him.” Byers replied, “If anything comes up, I’ll see what I can do.”<sup>188</sup>

Later that night, while Byers was posted on security police duty at one of the base gates, Duga rode up to the gate on a bicycle. Byers and Duga were in the same security police squadron and considered each other friends. They talked about various things in a very casual manner. Then, because Byers was curious about rumors he had heard concerning things that had been happening and because he “just kind of wondered whether he had been left in the dark about it,” he asked Duga “what he was up to.”<sup>189</sup> Duga responded with incriminating admissions concerning the recent thefts. Byers then asked Duga more questions concerning his conduct, and Duga confessed that he had stolen the canoe and some other property. Byers did not advise Duga of his rights at any time.

The next night, Byers had another conversation with Duga in the squadron dormitory where they both lived, in the presence of other people. Duga further discussed his criminal involvement without receiving rights warnings.

Two days later, Byers decided to go to OSI with the information he had obtained about Duga. At Duga’s court-martial, Byers maintained that he did not question Duga for the purpose of finding out information for the OSI, and that he never really thought about what he would do with the information at the time he received it.

Chief Judge Everett’s opinion, concurred in by Judge Fletcher, revived the *Gibson* test. The court held that

in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. *United States v. Gibson, supra*. Unless both prerequisites are met, Article 31(b) does not apply.<sup>190</sup>

Applying this officiality plus perception test to the facts of the case, the majority found that as to the first condition, “the questioning was not done in an official capacity — that is Byers was not acting on behalf of the Air Force — either as a security policeman or as an agent of

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<sup>188</sup>*United States v. Duga*, 10 M.J. 206, 207 (C.M.A.1981).

<sup>189</sup>*Id.*

<sup>190</sup>*Id.* at 210.

the OSI.”<sup>191</sup> Furthermore, as to the second condition, “[t]he evidence portrays a casual conversation between comrades, in which . . . [Duga] voluntarily discussed with Byers his general involvement in crime. . . . [T]here was no subtle coercion of any sort which could have impelled . . . [Duga] to answer Byers’ questions.”<sup>192</sup> Neither of the conditions was met; thus Byers had no duty to warn.

The court cited *Gibson* in the heart of its test and five other times throughout the opinion. The court demonstrated its reliance on the *Gibson* rationale by stating that “long ago in *United States v. Gibson* . . . this Court concluded, after a careful study of the Article’s purpose and legislative history, that Congress did not intend a literal application of that provision.”<sup>193</sup>

What are the policy objectives underlying this test? The policy objective implemented by the first condition is the same as the officiality test’s objective discussed above.<sup>194</sup> *Gibson* and *Duga* merely adopted Judge Latimer’s officiality condition. The policy underlying the second condition was new. That policy was designed to permit undercover agents to operate without the limitations of article 31(b). In the court’s view, the compelling need for effective undercover operations justified an interpretation of article 31(b) contrary to the plain meaning of its language.

What is the strength of this test? The *Duga-Gibson* test admits confessions in more situations than any of the other tests, because it gives the government *two* opportunities to escape the exclusionary provision of article 31(d). As discussed above, the greater the amount of relevant and trustworthy evidence that is admitted at trial, the greater the chance the finder of fact will reach an accurate result. Therefore, the *Duga-Gibson* test theoretically provides the highest probability of an accurate finding by the court-martial, relative to the other tests devised by the judges of the Court of Military Appeals.

The specific strengths and weakness of the officiality, or first condition, of *Duga-Gibson* have already been discussed.<sup>195</sup> The remainder of the discussion in this subsection will focus on the second condition of *Duga-Gibson*: the perception of officiality by the suspect.<sup>196</sup>

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<sup>191</sup>*Id.* at 211.

<sup>192</sup>*Id.*

<sup>193</sup>*Id.* at 208, 209.

<sup>194</sup>See *supra* notes 167-68 and accompanying text.

<sup>195</sup>See *supra* notes 168-72 and accompanying text.

<sup>196</sup>To put things in proper perspective, although the *Duga-Gibson* test contains two conditions that must be met for there to be a warning requirement, the second condition has rarely been the determinative factor. The majority of cases have rested on

What is the strength of the second *Duga-Gibson* condition? The perceived officiality condition permits undercover agents the opportunity to accomplish their mission without having to give warnings, and thus reveal their identity. This was the specific policy objective behind the *Gibson* decision. Judge Latimer's officiality test and the literal interpretation test required a military undercover agent acting in furtherance of an official investigation to advise the suspect according to article 31(b), thus drastically curtailing the scope of undercover operations.<sup>197</sup> At best, undercover agents would only be able to observe and listen, but not be able to ask any questions. Thus, their effectiveness would be substantially reduced.

The rationale used to support the perception condition of *Duga-Gibson* consisted of a simple chain of logical assumptions. If the suspect was not aware of the official nature of the questioning, he was under no pressure to answer. If there was no pressure to answer, there was no compulsion. No compulsion meant no violation of the right against self-incrimination. If there was no violation of the right against self-incrimination, there was no need to warn the suspect that he had the right to remain silent. Simply put, why warn a person that he had a right to protect himself from a danger, if the danger did not exist? The second *Duga-Gibson* condition denied the accused the opportunity to benefit from the exclusionary protection of article 31(d) in situations where no pressure to confess was felt. It is unrealistic to assume that every time a person subject to the Code asks a subordinate a question, the subordinate feels compelled to answer. Allowing the government the opportunity to show that no compulsion was used to obtain the confession fine tunes article 31(b) so that only those persons who really need the protection of the warnings get it, and those who do not will not reap an undeserved benefit.

What was the fallacy in the rationale of the second condition of *Duga-Gibson*, and what potential harm could it cause? When Chief Judge Quinn reviewed the history of the warning requirement, he failed to account for the significant change in the nature of the warning requirement produced by the Elston Act and by the UCMJ. His conclusion that article 31(b) was intended to alleviate only the pressures generated by the effect of superior rank or official position was partially correct. That was the original purpose for the warning requirement, but after the Elston Act in 1948, and especially after the UCMJ in 1951, the warning requirement implemented several policy objectives. The potential harm caused by this narrow interpretation

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findings that the questioner was not acting in an official law enforcement capacity; thus, the military courts often do not discuss the second condition.

<sup>197</sup>See, e.g., *United States v. Gibson*, 14 C.M.R. 146, 176 (C.M.A. 1954).

was that military suspects and accuseds could be denied rights granted to them by Congress, and the morale of military units could be adversely affected.

First, a quick review of the history of the military warning requirement illustrates how Chief Judge Quinn interpreted article 31(b) too narrowly. As discussed above,<sup>198</sup> the first evidence of a duty to warn appeared in the 1917 Manual for Courts-Martial, declaring that a duty to warn was “devolving upon investigators and military superiors” when conducting an investigation.<sup>199</sup> In 1917 warning an accused was the practice, not the law. If the rights warnings were not given by the military personnel conducting an investigation, the government could still prove that the confession was otherwise voluntary, and thus trustworthy enough to escape the exclusionary provision of the hearsay rule. Failure to warn created a rebuttable presumption of involuntariness under the common law rule of confessions. The government had to make an affirmative showing that the confession was voluntary. Warnings were clearly a matter within the exclusive domain of the common law rule of confessions.

Under the Elston Act, Congress expressed strong concern for ensuring respect of the constitutional right against self-incrimination. The Act elevated the duty to warn from the level of desirable practice under the common law rule of confessions to the level of federal law under the constitutional right against self-incrimination. The Elston Act, however, did not make unwarned confessions inadmissible *per se*. Nevertheless, the only way the government could admit an unwarned confession under the Act was to show that the accused was “otherwise aware of his right against self-incrimination.” The government could no longer escape the exclusionary rule by showing that the confession was truly voluntary.

This change in the very nature of the warning requirement was a novel, radical leap forward in the development of the warning requirement. Consider the critical difference in the treatment of unwarned confessions by the law prior to, and subsequent to, the Elston Act. Prior to the Elston Act the government had the much easier burden of showing that an unwarned confession was “otherwise voluntary.” After the Elston Act, the government had the more difficult task of showing that the accused was “otherwise aware of his right against self-incrimination.” The objective of the warning in the first instance was to increase the probability of obtaining a voluntary, and

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<sup>198</sup>See *supra* note 120 and accompanying text.

<sup>199</sup>MCM, 1917, para. 225.



thus trustworthy, confession. The objective in the second instance was to ensure the accused knew he had a constitutional right to remain silent. In keeping with its objective, the Elston Act required all persons conducting an investigation to warn an accused. No after-the-fact inquiry into the perception of the accused was permitted, unless it was for the limited purpose of showing that the accused was "otherwise aware of his rights." The Elston Act pushed the warning requirement into a totally new dimension.

The radical leap forward for the warning requirement under the Elston Act was followed shortly by the continued advances of the UCMJ. Article 31(b) and (d) made the duty to warn absolute. The government lost its last after-the-fact method for avoiding the exclusion of an unwarned confession. The possibility of escaping the exclusionary provision of article 31(d) by showing the accused was already aware of his rights disappeared. The 1951 Manual for Courts-Martial equated a failure to warn with compulsion, coercion, unlawful influence, and unlawful inducement, thus making an unwarned confession per se involuntary. The objective of the warning under article 31(b) was not just to make a suspect or accused generally aware of his constitutional rights, but also to ensure the suspect or accused was actually warned of his rights, whether or not he was already aware of them. Only by requiring warnings could Congress be assured that a suspect would be put on notice that a military superior asking him questions did so in a law enforcement capacity, and not in a personal capacity or in one of his many other official, non-law enforcement capacities.

The concept of an unwarned confession being per se involuntary under certain circumstances was unique to the military until 1966. In *Miranda v. Arizona*<sup>200</sup> the Supreme Court decided that an unwarned confession obtained by police during custodial interrogation was per se involuntary. The Court did not permit the government to show that the unwarned confession was obtained without coercion or compulsion, thus making it voluntary. The Court believed that the only effective method for safeguarding the suspect's right against self-incrimination during custodial interrogations was to create an irrebuttable presumption that coercion existed, even if it did not. The Court also expressly prohibited the government from escaping the exclusionary rule by proving the accused was otherwise generally aware of his rights.<sup>201</sup> Warnings had to be actually given to all persons interrogated while in custody.

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<sup>200</sup>384 U.S. 436 (1966).

<sup>201</sup>*Id.* at 468, 469.

Although article 31(b) and *Miranda* required warnings under different circumstances, the analytical approach was very similar. Both created irrebuttable presumptions that under certain circumstances, an unwarned confession was per se involuntary. Why did Congress and the Supreme Court resort to the creation of such a drastic legal device as an irrebuttable presumption under certain circumstances? They believed it was essential to formulate a strong rule with no loopholes to ensure the adequate implementation of the right against self-incrimination. Anything less than an irrebuttable presumption was too susceptible to circumvention and evasion.

*Miranda* and article 31(b) both use rights warnings as the tool for implementing the right against self-incrimination, but in different environments. In *Miranda* the rights warnings help neutralize the implicit coercion of the custodial interrogation environment. There is less of a need, as compared to the military environment, to alert the suspect that he faces a situation where he may wish to invoke his right against self-incrimination, because the very nature of the custodial interrogation makes it obvious that the questioner is acting in an official law enforcement capacity.

In article 31(b) the rights warning serves three purposes. First, the warnings serve to neutralize the implicit coercion or influence generated by rank and duty position. Second, the warnings generally inform the ignorant suspect or accused of his constitutional rights. Finally, the rights warnings alert the suspect or accused that the questioner is acting in an official law enforcement capacity, not in the suspect's best interest.

The Supreme Court recognized the need for the third and highest, most sophisticated purpose of rights warnings even in the civilian community, where the need is not as critical as it is in the military environment. In *Miranda* the Court proclaimed that "warning[s] may serve to make an individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest."<sup>202</sup>

The second condition of *Duga-Gibson* turns the clock back on the reforms made by Congress in the Elston Act and in the UCMJ. It changes the intended irrebuttable presumption of article 31(b) and (d) into a rebuttable presumption by allowing the government to do what it used to do before the Elston Act: make an affirmative showing that the confession was "otherwise voluntary" by demonstrating that the accused perceived no officiality in the questioning and thus was

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<sup>202</sup>*Miranda v. Arizona*, 384 U.S. at 469.

under no pressure to answer the questions. *Duga-Gibson's* second condition ignores the fact that the 1951 Manual for Courts Martial equated a failure to warn with an involuntary confession.

What is the potential harm resulting from a continuation of the *Duga-Gibson* second condition? Military leaders could question a subordinate suspect under the pretext of counseling him for his own good, while in reality functioning as a law enforcement investigator. This cruel deceit could not only betray the trust the individual suspect had in the leader, but many others in the unit could also lose confidence in the leader, thus lowering the unit's morale.

A closer examination of the uniqueness of military leadership reveals how lower unit morale could occur as a result of the *Duga-Gibson* second condition. First, one must appreciate the fact that military leaders perform many different functions as part of their official duties. A civilian manager has only one official relationship with his subordinate employees: he is their supervisor. In the military, the company commander, first sergeant, and platoon sergeant have many official relationships with their subordinates: combat leader; mission supervisor; teacher; financial, marriage and health counselor; and many others.

Maintaining good order and discipline is also an important official duty of the military leader. A unit without these qualities cannot fight and win. Thus, the military leader is also a law enforcer. As part of the law enforcement activities, the military leader may have to conduct an investigation. Suppose the military leader decides he is going to deceive the suspect by making him believe the questioning is motivated by a non-law enforcement reason, when in fact the purpose is to obtain an incriminating confession. Is this scenario different from a traditional military undercover operation where the agent's identity is hidden? In *Gibson* Chief Judge Quinn and Judge Brosman drew no distinction between these two types of deceit. Trickery was permissible so long as there was no pressure on the suspect to talk. They believed that because the officiality of the questioning was hidden during undercover questioning, there was no danger of subtle military pressures generated by rank or duty position.

A closer look at these two types of deception reveals a significant difference in their method. In the traditional military undercover operations, the suspect does not know the true identity of the undercover agent. The suspect trusts the undercover agent because he wants to share his exploits with someone else, make a friend, sell drugs, or for numerous other reasons. When the suspect is "betrayed" by the undercover agent, he truly has no one to blame but himself for being careless enough to talk with someone he did not know well.

The situation is totally different when the deception is perpetrated by the suspect's military leader. To make the deception work, the suspect must believe the military leader is acting in one of the official, yet noninvestigative capacities of military leaders, such as counselor or job supervisor, thus implying possible confidentiality of the information from law enforcement officials. For example, if the suspect believes his platoon sergeant was counseling him to help him get over a drug problem, when in fact the platoon sergeant was really trying to obtain incriminating information, what impact will the betrayal have on the suspect and the other members of the unit? The suspect may not blame himself for being careless, nor may the other members of the unit blame the suspect. They will view the situation as a betrayal of the military leader's trust, reducing the leader's future effectiveness in that unit, and thus lowering the morale. The potential for harm to unit morale and cohesion far outweighs any possible crime-solving benefits by this type of deceptive tactic. Yet this type of ruse is permitted by the *Duga-Gibson* second condition.

Can the potential for harm under the *Duga-Gibson* second condition be reduced or eliminated, while still permitting traditional covert agents to avoid the limitations of article 31(b)? The *Gibson* majority could have specifically held that persons involved in traditional undercover operations are exempted from article 31(b). Traditional undercover operations are activities where the true identity and motive of the questioner is hidden, not just the true motive of the questioning, as is the case when the military leader practices deceit.

It would not be impossible to carve out a narrow exception to article 31(b). In *United States v. Jones*<sup>203</sup> the Army Court of Military Review decided that when there is a possibility of saving human life or avoiding serious injury and no other course of action is available other than questioning the suspect without warnings, an exception exists to the requirements of article 31(b) and *Miranda*. The policy in favor of saving human life outweighs the accused's fifth amendment interest. Thus, precedent exists for carving out a narrow exception to article 31(b).

In sum, the second condition of *Duga-Gibson*, in trying to exempt covert agents from the warning requirements, attributed an exceedingly narrow policy objective to article 31(b): the neutralization of the subtle pressures in the military generated by rank and duty position. Although this was the *original* purpose for warning an accused, it did not remain the exclusive purpose. The Elston Act added the fifth amendment policy objective of ensuring that the accused

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<sup>203</sup>19 M.J. 961 (A.C.M.R.), *affirmed*, 26 M.J. 353 (C.M.A. 1988).

generally knew what his rights were at the time of questioning, either by warnings or other means. Article 31(b) added the policy objective of warning a suspect or accused any time an interrogation seeking incriminating information takes place. Although this policy was grounded in the fifth amendment, it extended beyond the minimum constitutional protections. To say that warnings need only be given when coercion or unlawful influence is present confuses the policy objectives of the common law rule of confessions with those of the right against self-incrimination. Article 31 was a remarkable achievement, because it brought together so many different legal principles. This fusion of multiple, complex legal principles is in large part responsible for the great difficulty military lawyers and judges have had in interpreting article 31, specifically subsection (b).

#### 4. *The Dohle Position of Authority test*

In 1975 the Court of Military Appeals decided *United States v. Dohle*,<sup>204</sup> in which the accused was convicted of larceny of four M16 rifles and fourteen padlocks from his company arms room. After investigators asked Dohle for consent to search his room, they found the rifles there. They took Dohle back to the orderly room and advised him of his rights under article 31(b) and *Miranda*. He invoked his rights, and no further interrogation took place.

Sergeant Prosser was the unit armorer who first discovered the missing weapons and padlocks. He was also a friend of Dohle's. "Sergeant Prosser was detailed to guard [Dohle] while his transfer to confinement was being arranged. Without advising him of his rights, Prosser questioned [Dohle] about the theft. [Dohle] stated in response to the questions that he had taken the rifles."<sup>205</sup> Prosser's asked the questions because the two were good friends and because Prosser wondered why anyone would take the rifles.

Chief Judge Fletcher noted that Prosser believed "he was acting in a personal capacity, not professional [when he asked Dohle the questions]; he had not been directed to question [Dohle]; and he did not intend to use any admissions against him."<sup>206</sup> Chief Judge Fletcher acknowledged that previous decisions in this area "have analyzed the facts to determine if the interrogator was acting officially or solely with personal motives."<sup>207</sup> He believed, however, that this test was improper and declared that the "subjective nature of this inquiry re-

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<sup>204</sup>1 M.J. 223 (C.M.A. 1975).

<sup>205</sup>*Id.* at 224.

<sup>206</sup>*Id.* at 224, 225.

<sup>207</sup>*Id.* at 225.

quires a difficult factual determination, both at trial and appellate levels.”<sup>208</sup> Chief Judge Fletcher stated that

[w]here the questioner is in a *position of authority* [over the accused or suspect], we do not believe that an inquiry into his motives ensures that the protections granted an accused or suspect by Article 31 are observed. . . . We must recognize that the position of the questioner, regardless of his motives, may be the moving factor in an accused’s or suspects’s decision to speak. *It is the accused’s or suspect’s state of mind, then, not the questioner’s, that is important.*<sup>209</sup>

Based on this rationale, the Chief Judge announced a new test for determining who needs to warn, purportedly overruling the numerous decisions requiring an element of officiality in the questioning before article 31(b) warnings were required. He declared that

where a person subject to the Code interrogates—questions—or requests a statement from an accused or suspect over whom the questioner has some *position of authority* of which the accused or suspect is *aware*, the accused or suspect must be advised in accordance with Article 31.<sup>210</sup>

Under this test, article 31(b) warnings should have preceded Proser’s questioning of Dohle, and admission of the confession was erroneous. Judge Cook and Judge Ferguson concurred in the results, but not in the rationale used by Chief Judge Fletcher.<sup>211</sup> Thus, a majority of the court did not endorse the test.

What policy did Chief Judge Fletcher try to implement? He did not want the rank or duty position of a questioner to be the inducement for a confession. By requiring warnings whenever the questioner was in a position of authority over the suspect, the subtle, unspoken pressure to talk inherent in such relationships could be significantly reduced.

What were the strengths of this test? First, it sought to eliminate all situations where coercion might be felt in the mind of the suspect. The test shared one of the strengths of the *Wilson* literal interpretation test, but without the negative side effect inherent in *Wilson* of providing excess protection to undeserving suspects. Under the *Dohle* test, questioners of equal or lower rank relative to the suspect could

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<sup>208</sup>*Id.*

<sup>209</sup>*Id.* at 226 (emphasis added).

<sup>210</sup>*Id.* (emphasis added).

<sup>211</sup>*Id.*

carry on a conversation with the suspect without having to warn him, because there is no subtle pressure to talk based on rank disparity.

The most obvious strength of the *Dohle* test was its ease of application. The duty to warn turned on the objective determination of whether the questioner was in a position of authority over the suspect. The questioner could be in a position of authority over the suspect in two ways: he held higher rank than the suspect or he held a law enforcement position. The second part of this test required the accused to be aware of the questioner's position of authority. The trial judge made a determination of the suspect's subjective perceptions. This test, however, was much easier to apply than the *Duga-Gibson* officiality plus perception test. Under the second condition of *Duga-Gibson*, the suspect had to perceive "that the inquiry involved more than a casual conversation" regardless of the questioner's position relative to the suspect. Thus, a superior could engage in what appeared to the suspect to be a casual conversation, and not have to give warnings, even if the superior's motive was to obtain incriminating information.

Under *Dohle*, the suspect must perceive "that the questioner has some position of authority over him." Therefore, regardless of how casual the superior made the conversation appear, he would still have to give warnings if the suspect was aware of the superior's rank or duty position.

What were the weaknesses of the position of authority test? Since the test turned on the questioner's rank or position, his motives were irrelevant. Thus, warnings were required in situations where the questioner acted in a governmental law enforcement capacity, but also in situations where the questioner acted on personal or non-law enforcement motives. The test required warnings in situations where the suspect felt pressure to talk because of the questioner's rank or duty position, but also in situations where there was no pressure, despite the questioner's superior rank or duty position. Imagine a scenario where a soldier simultaneously questions two fellow platoon members who also are suspects, without advice of rights, one of whom is senior in rank and the other junior in rank to the questioner. Under the *Dohle* test, the junior soldier's statement would be inadmissible, but the senior soldier's would be admissible, even though neither suspect felt any pressure to talk to their friend.

Another weakness of the *Dohle* test was that it created the potential for punishing the government through the exclusionary rule in situations where the government might not have been involved. There is no benefit derived from punishing the government through

exclusion of relevant evidence if there was no governmental questioning. When the questioner is motivated by personal considerations, the fifth amendment should not apply, and it is counterproductive to excluded relevant evidence in those situations.<sup>212</sup>

Another weakness of the *Dohle* test was that when a military leader suspected a subordinate of a minor offense and wanted to counsel him for non-law enforcement or disciplinary reasons, the test would require warnings. This would possibly prevent the counseling and at best chill the discussion. In sum, Judge Fletcher tried to draw a bright line in an area of the law that is incapable of being defined by easy bright line rules.

## V. CONCLUSION

Who should be required to give article 31(b) warnings? The answer to the question depends on which policy objective is held in the highest esteem. All four test have strengths, because they each effectuate a legitimate policy objective. They all have weaknesses because they exclude other policy objectives. Like many other difficult legal issues, the key to answering the question is knowing where to strike the proper balance between the law enforcement needs of the government and the rights of the individual.

The *Wilson* literal interpretation test granted the individual entirely too much protection. Statutes cannot anticipate every possible situation; therefore, judicial interpretation — not passivity — is necessary to fill the gap. A literal interpretation of article 31(b) ignored the reasonable necessities of law enforcement.

The second condition prong of the *Duga-Gibson* test conditioned the rights warnings on the perceptions of the suspect, even though the decision to warn belonged to the questioner. Not only was this illogical, but it disregarded the multiple policy objectives embraced by article 31(b) to the detriment of individual service members and the armed forces. Thus, the *Duga-Gibson* test tips the scales too far in favor of law enforcement officials.

The *Dohle* position of authority test attempted to find an easy answer for an extremely complex issue. The result was a test that required warnings in situations where they should not be required, and that did not require warnings in situations where they should be required. A bright line rule does not work well in an area of the law that has numerous legal principles interacting with each other simultaneously.

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<sup>212</sup>See *supra* notes 168-69 and accompanying text.



Judge Latimer's officiality test, requiring warnings when the questioner acts in an official law enforcement capacity, is probably the most meritorious test, because it strikes the most equitable, reasonable balance between the needs of the government and the rights of the individual. The committee that drafted the Military Rules of Evidence "was of the opinion . . . that both Rule 305(c) and Article 31(b) should be construed at a minimum, and in compliance with numerous cases, as requiring warnings by those personnel acting in an official disciplinary or law enforcement capacity."<sup>213</sup> Furthermore, the historical development of the right against self-incrimination and of the warning requirement in the military probably supports Judge Latimer's test more strongly than it supports any of the other tests.

The officiality test recognizes that article 31(b) grants an accused or suspect the right to be actually warned when a government agent seeks incriminating information. The officiality test does not permit an after-the-fact inquiry to ascertain if there really was any coercion, unlawful influence, or unlawful inducement perceived by the suspect or accused. Those are totally separate concerns that should be considered only if rights warnings were given. If rights warnings were not given, that should be the end of the inquiry, and the confession should be excluded.

What of the need for effective undercover operations? Congress could amend the Uniform Code of Military Justice to specifically exempt from article 31(b) persons who are conducting official undercover operations, managed by official law enforcement agencies and targeting suspects, so long as the questioning is prior to any kind of restriction or preferral of charges against a suspect.<sup>214</sup> Although less desirable than legislative action, but preferable to the second condition of *Duga-Gibson*, the Court of Military Appeals could satisfy the need for undercover operations by means of a narrow and specific exception for law enforcement officers assigned to traditional undercover operations where the identity of the agent is hidden. Informants who do not occupy a position of leadership relative to the suspect could likewise be exempted, since the ill effects of deceit practiced by leaders would not occur in those situations.

It is difficult to predict where the Court of Military Appeals will go next in its quest to settle the question of who should warn under arti-

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<sup>213</sup>"Mil. R. Evid. 305(c) analysis (emphasis added).

<sup>214</sup>See Mil. R. Evid. 305(d)(1)(B) analysis. In the military, an accused or suspect must be advised of his rights to counsel prior to questioning, whether open or surreptitious, if the questioning takes place after preferral of charges or imposition of pretrial arrest, restriction, or confinement. *Id.*

cle 31(b). The important point for the military criminal trial lawyer is that, in view of the unsettled nature of the law, a well-reasoned and persuasive argument can be fashioned to support almost any position. To formulate the argument, an understanding of the historical development of the right against self-incrimination and the warning requirement, as well as the policy objectives of the different Court of Military Appeals tests, is necessary.

## PUBLICATION NOTES

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time by the editor of the *Military Law Review*. With Volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. The number of publications received makes formal review of the majority of them impossible. Description of a publication in this section, however, does not preclude a subsequent formal review of that publication in the *Review*.

The comments in these notes are not recommendations either for or against the publications noted. The opinions and conclusions in these notes are those of the preparer of the note. They do not reflect the opinions of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

The publications noted in this section, like many of the books formally reviewed in the *Military Law Review*, have been added to the library of The Judge Advocate General's School. The School thanks the publishers and authors who have made the books available for this purpose.

**Dinstein, Yoram, *War, Aggression and Self-Defence*. Cambridge: Grotius Publications Limited, 1988. Pages: 278. Index of Persons, Index of Subjects, Table of Cases, Table of Treaties. Price: \$95.00. Publisher's address: Grotius Publications Limited, P.O. Box 115, Cambridge CB3 9BP, United Kingdom.**

One of the most intractable problems in international law is how to achieve effective restraints on the use of force by one state against another. The enduring relevancy and practical urgency of the issue can be seen in the myriad of regional conflicts ongoing in the world today.

The nature of war, both between states and within states, is the focus of this detailed study by Yoram Dinstein, Professor of International Law of Tel-Aviv University. Professor Dinstein draws on the historical origins of the attempts at defining war and aggression to demonstrate the enormous difficulties involved in articulating the concepts. He further traces the evolution of these concepts through several centuries of efforts by scholars seeking to distinguish the various forms of **armed** conflict under international law in the broader search for controls on aggression.

Professor Dinstein next examines the current treatment of aggression under the United Nations Charter and the various resolutions of

the U.N. General Assembly. He analyzes in detail article 2(4) of the Charter, which prohibits the use of force against the territorial integrity or political independence of any other sovereign state. He particularly focuses on the right of self-defense as the Charter's one explicit exception to the prohibition on the use of force. Armed attack, whether initiated directly or indirectly by the forces of an aggressor state, triggers a right of self-defense that may be employed unilaterally by the victim state or through collective measures sanctioned by the U.N. General Assembly.

His analysis of nonintervention adheres very strictly to traditional principles limiting the legal justifications for the use of force. To the extent other possible justifications are embraced by Professor Dinstein at all, their legitimacy is recognized primarily through the concept of self-defense as an exclusive exception permitting intervention. He applies the concepts to various contemporary situations in which states have used force against one another. Of the United States intervention in Grenada, for example, he says that the operation fell short of an adequate justification based on the rescue of nationals under the self-defense theory. This was, he said, because of the long duration of the U.S. presence in the country. By way of contrast, he cites the 1976 Israeli raid on the Entebbe airport in Uganda as an example of a proper invocation of self-defense on behalf of one's nationals.

Professor Dinstein basically presents a conservative view of current post-Charter international law. "Wars of national liberation" illustrate what he regards as a "curious recrudescence" of a just war criteria for intervention that is "corroded by political motivations." Whether or not such an outbreak of moralism in international law should be considered regrettable, wars of national liberation are regarded by Professor Dinstein as exclusively internal matters not amounting to matters of international dimension warranting intervention.

The narrow interpretation given to the situations in which unilateral intervention by force is justified places a significant reliance on the practical effectiveness of collective security measures. The book, therefore, concludes by examining the various alternatives available for implementing the U.N. system of collective security measures and peacekeeping functions under United Nations supervision. Professor Dinstein suggests that criticisms of the General Assembly's ability to respond in a timely and meaningful way to the frequent violations of the Charter principles can be overcome in practice.

The vitality of the use of force principles that Professor Dinstein has so carefully documented will continue to be tested by states in their relations with each other. The ability of the U.N. system to fulfill its intended role as the central mediator in the disputes that lead to armed conflict will ultimately be crucial to the framework of international law that he has described. *War, Aggression and Self-Defence* will remain, in the meantime, a major resource guide to the development of restraints on force as established under international law.

Shaw, Malcolm N., *International Law*. Cambridge: Grotius Publications Limited, 1986. Pages: 627. Abbreviations, Table of Cases, Index. Price: \$21.00. Publisher's address: Grotius Publications Limited, P.O. Box 115, Cambridge CN3 9BP, United Kingdom.

This textbook on international law advertises itself as a cross between a short introduction and a major treatise. This hybrid nature is both its weakness and its strength. International law is such a broad and diverse subject that any single volume must necessarily sacrifice detail for brevity. For example, the law of armed conflict covers only eleven pages of text. On the other hand, if the reader is looking for a highly readable, inexpensive volume on international law to use either as an introduction to the subject or as a fast reference tool, this book is well worth the modest investment, particularly in regard to recent developments in space law and the law of the sea.

Kintner, William R., *Soviet Global Strategy*. Fairfax, Virginia: **HERO** Books, 1987. Pages: xv, 273. Foreword by Clare Boothe Luce, Index. Price: \$24.95. Publisher's address: **HERO** Books, 10392 Democracy Lane, Fairfax, Virginia 22030.

Since the advent of the Cold War, Western commentators have devoted thousands of books and articles to the elusive topic of Soviet global strategy. One school of thought is that Soviet expansionism is based on little more than the fierce nationalism that the Russian people have displayed for centuries. The opposing school contends that the expansionism is founded on some complex Marxist-Leninist scheme for world domination. Kintner leaves the reader with no doubt as to which school he ascribes; he contends that the Soviets will stop at nothing short of global conquest through virtually any means.

Kintner devotes the bulk of his book to a detailed analysis of Soviet encroachment in each region of the world. He focuses on developments of the past decade, such as Soviet expansion into the South Pacific. He is very blunt in stating his conclusions, but he supports these conclusions in such a fashion that one wonders how much is fact

and how much is rhetoric. He makes sweeping statements and uses a facetious tone that detracts from the objectiveness of his conclusions. Nonetheless, this **book** will definitely interest those readers who are intrigued by modern Soviet operations.

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